PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
MAR 3 - 2009
OFFICE OF THE CLERK

No. 08-081113

In The
Supreme Court of the United States

LEROY McKNIGHT, *et al.*,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Do the anti-discrimination protections of the Americans With Disabilities Act and its implementing regulations apply to disabled former employees?

(2) Under the Americans With Disabilities Act and its implementing regulations, may an employer, which does not reduce the retirement benefits of non-disabled workers who have post-retirement earnings, reduce the retirement benefits of disabled workers solely because they receive federal disability benefits?

PARTIES

The petitioners are Leroy McKnight, Nicholas Klayo, and Robert Griffin. The respondent is the General Motors Corporation.

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Petitioners Leroy McKnight, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on December 4, 2008.

OPINIONS BELOW

The December 4, 2008 opinion of the court of appeals, which is reported at 550 F.3d 519 (6th Cir. 2008), is set out at pp. 1a-24a of the Appendix. The March 20, 2007 decision of the district court, which is unofficially reported at 2007 WL 851633 (E.D.Mich. 2007), is set out at pp. 25a-45a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on December 4, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix.

STATEMENT OF THE CASE

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), this Court held that Title VII applies to former employees. In the wake of *Robinson*, the courts of appeals have repeatedly disagreed as to whether the anti-discrimination provisions of the Americans With Disabilities Act (ADA) apply to disabled former employees. In the instant case the Sixth Circuit held that the ADA does not protect such former employees, expressly rejecting the contrary holdings in the Second and Third Circuits. (15a-20a).

This case concerns the early retirement benefits available to General Motors employees. After thirty years of employment, General Motors hourly and salaried workers[1] may retire even though they have not yet reached the normal retirement age. An employee who opts for early retirement initially receives two benefits, monthly retirement payments (which continue as long as the worker lives) and an early retirement supplement. The early retirement supplement lasts until the worker reaches the age of 62 and one month, at which point he or she is eligible for Social Security Old Age benefits.

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[1] The terms of the early retirement benefit programs for hourly and salaried employees are largely similar. (3a-5a).

Petitioner McKnight was an hourly worker prior to his retirement. Petitioners Klayo and Griffin were salaried employees.

Under both the monthly retirement and the early retirement supplement a retiree is free, without any reduction in benefits, to return to the workforce and work full time or part time. Retirees may, without any effect on their benefits, resume work for General Motors as contract employees, and a significant number of retirees do just that.

This case concerns the circumstance in which the pension plan[2] reduces a worker's benefits. If a retiree receives, or "could become eligible for," Social Security Disability Insurance benefits (SSDI), the retiree's monthly early retirement supplement is substantially reduced.[3] Social Security Disability Insurance provides

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[2] Under some circumstances certain types of Workers' Compensation payments received by a retiree may result in a reduction, of equal size, of retirement benefits. Motion for Summary Judgment Submitted by Defendant General Motors, Exhibit A, Supplemental Agreement Covering Pension Plan, Article IV, sec. 2. No deductions are permitted, for example, for "fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member."

In the proceedings below, respondent offered no assertions or evidence as to whether such reductions have actually occurred, or how frequently, with regard to workers who had taken early retirement. Counsel for the employer acknowledged that (like SSDI) Workers' Compensation benefits "will probably be paid to somebody who is contending they are disabled." (Transcript of Motion for Summary Judgment, p. 13).

Neither court below referred to or relied on this provision.

[3] The early retirement supplement is reduced by the amount of the "temporary benefit" to which the retiree would have been entitled had he or she qualified for the Temporary Benefit. The Temporary Benefit is a separate benefit paid by

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benefits to individuals who are no longer able to work and who previously made Social Security contributions for the requisite number of quarters. See *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999). Under the General Motors retirement plans, if the Social Security Administration (because of the delay between application for and approval of monthly SSDI benefits) provides a retiree with a retroactive award of SSDI benefits, General Motors insists on repayment of a substantial sum for early retirement supplemental payments made by the company during the period for which SSDI benefits were later retroactively awarded.[4] Non-disabled workers are not subject to having their retirement

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General Motors to certain individuals who, because of disability, are permanently and totally prevented from regular employment at the General Motors plant where they have seniority. The eligibility standards and benefit levels of the Temporary Benefit are somewhat different than the standards for SSDI. The Temporary Benefit is not available to a disabled worker who is able to obtain SSDI or who is over 62 and one month and thus able to obtain Social Security Old Age benefits.

The court of appeals at one point suggested that the reduction is equal to the amount of the SSDI payment. (5a n.1). That is not correct. Elsewhere the court of appeals described the reduction as "apparently about equal to the...SSDIB." (5a). For all three of the plaintiffs the reduction in their early retirement supplement was smaller than the amount of the SSDI which they received.

[4] The reduction is equal to the total Temporary Benefit payments that would have been made to the worker, had he been eligible for them, during the period for which the retroactive SSDI benefits were paid. See n.3, *supra*.

benefits reduced or reclaimed in this manner because of post-retirement earnings.

Petitioner McKnight retired in February 2000; in November 2000, McKnight began receiving SSDI benefits. Because of the SSDI benefits, General Motors reduced McKnight's monthly retirement benefits by $1,165.50 per month,[5] from $2,730.00 to $1,564.50. (26a). The employer also claimed entitlement to repayment of $10,489.50 for retirement benefits previously paid to McKnight. (6a). In 2000 General Motors notified McKnight that it would suspend payment of even the reduced retirement benefits to McKnight "until the full amount of any overpayment has been recovered."[6]

Petitioner Griffin retired from General Motors in December 1998, and was awarded SSDI benefits in 2002. Because of the SSDI benefits, General Motors reduced Griffin's monthly retirement benefits by $951.45, to $1,182.04 per month. The employer claimed entitlement to repayment of $30,446.40 for retirement benefits previously paid to Griffin, to cover the period for which Griffin received retroactive SSDI benefits from the Social Security Administration. (6a, 32a). General Motors notified Griffin it

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[5] The reduction was less than the $1592.20 SSDI benefit which McKnight received. (26a).

[6] Memorandum of Law In Support of The Motion for Summary Judgment Submitted by Defendant General Motors, Exhibit H, Letter to Leroy McKnight, November 22, 2000.

would suspend payment of any retirement benefit until that $30,446.40 had been recovered.[7]

Petitioner Klayo retired in January, 1999, and was awarded SSDI in 2003. Because of the SSDI benefits, General Motors reduced Klayo's retirement benefits by $976.86 per month, and claimed entitlement to repayment of $35,166.96 for earlier retirement benefits previously paid to Klayo. The employer notified Klayo that it would suspend payment of any retirement benefits until that $35,166.96 had been recovered.[8]

Plaintiffs brought this action in 2005, alleging inter alia that the reduction in their monthly retirement benefits, as well as the required repayment, violated the Americans With Disabilities Act. The underlying facts were largely undisputed. The district court granted summary judgment to the defendants.

The district court concluded that disputed reductions in the retirement benefits of disabled workers are permitted by the ADA.[9] First, the district court

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[7] 6a; Memorandum of Law In Support of The Motion for Summary Judgment Submitted by Defendant General Motors, Exhibits C, D and I.

[8] 6a, 31a; Memorandum of Law In Support of The Motion for Summary Judgment Submitted by Defendant General Motors, Exhibits D, F and I.

[9] The courts below characterized this issue as one of whether the plaintiffs "have standing under...the ADA to pursue their claims." (2a; see 7a, 8a, 10a, 25a). This is a confusing, if not incorrect, use of the term "standing." The plaintiffs certainly have

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held that the ADA simply does not protect disabled former employees from discrimination on the basis of disability. (32a-40a). The district judge acknowledged that the Second and Third Circuits had both held that disabled former employees are protected by the ADA. (36a-37a). He noted, however, that several other circuits – particularly the Sixth and Ninth Circuits – had reached the opposite conclusion, and decided to interpret the ADA, as had "a majority of circuits," to exclude disabled former employees from the protections of the Act. (39a). Second, the district court reasoned that the ADA permits an employer to reduce the benefits of disabled, but not non-disabled workers, because of outside sources of income. (40a-42a).

The Sixth Circuit affirmed. The court of appeals noted that "[w]hether disabled former employees are 'qualified individuals' under Title I [of the ADA] is an issue that has divided the circuits." (9a). The Sixth Circuit acknowledged that the Second and Third Circuits had held that disabled former employees are protected by the ADA (9a), but rejected the reasoning of those circuits as "tenuous at best." (20a). The Third

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standing in the constitutional sense; they were injured by the practice complained of, and would benefit from an order restoring the amount of their original retirement benefits or awarding improperly withheld past benefits. See *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 604-05 (3d Cir. 1998); *Conners v. Maine Medical Center*, 42 F.Supp.2d 34, 40 (D.Me. 1999).

Although the language utilized by the courts below may be of no substantive significance, for clarity we avoid this idiosyncratic use of the term "standing."

Circuit decision,[10] the court of appeals objected, "disregarded the plain language of the statute." (20a). The Sixth Circuit decided instead to follow the rule in "the majority" of circuit courts, which had concluded that disabled former employees are not protected from discrimination. (17a). The ADA, "by its plain language, ... does not apply to former employees who are unable to perform the essential functions of their jobs." (21a). That limitation, the Sixth Circuit held, applied to retired workers despite the fact that those workers – by definition – have no job functions to perform.

The court of appeals also held that the ADA, even if applicable to disabled former employees, permitted the employer to reduce the benefits of the disabled retirees, but not non-disabled retirees, on the basis of outside income. The ADA, it reasoned, only required General Motors to accord disabled workers "equal access to the benefit programs." (24a).

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[10] The reference is to *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998).

REASONS FOR GRANTING THE WRIT

I. THERE IS A DEEPLY ENTRENCHED INTER-CIRCUIT CONFLICT REGARDING WHETHER THE ANTI-DISCRIMINATION PROTECTIONS OF THE ADA APPLY TO DISABLED FORMER EMPLOYEES

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), this Court held that Title VII applies to former employees. In the wake of *Robinson*, the courts of appeals have sharply disagreed as to whether the anti-discrimination provisions of the Americans With Disabilities Act apply to disabled former employees. Six circuits have now addressed this issue, openly disagreeing with one another as the proper construction of the ADA. In *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), then Judge Alito noted that

> the difficult issue[ ] of...whether a former employee who can no longer work can meet Title I's "qualified individual with a disability requirement"...ha[s] divided the circuits.

145 F.3d at 615. "[T]he different positions staked out by the circuit courts are intractable and create an affirmative inter-circuit split." *Hatch v. Pitney Bowes, Inc.*, 485 F.Supp.2d 22, 34 (2007).

The conflict grows out of the awkward way in which the ADA is written. Section 12112(a) forbids an employer to "discriminate against a qualified individual with a disability because of the disability." 42 U.S.C. § 12112(a). Sections 12112(b) and 12112(d)

specify several types of discriminatory actions that are forbidden by section 101(a); although some of the provisions in sections 102(a) and 102(d) are limited to "qualified" employees or applicants,[11] many of those provisions contain no such restriction.[12] 42 U.S.C. §§ 12112(b), 12112(d). Section 12112(b), moreover, expressly forbids discrimination with regard to fringe benefits, certain types of which (such as retirement benefits) are only provided to former employees. Section 12111(8), on the other hand, defines "qualified individual with a disability" to mean "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position that such individual holds or desires." 42 U.S.C. § 12111(8). Former employees, of course, usually neither hold nor desire any position with the employer that is providing them with fringe benefits. These divergent provisions have led to widespread disagreement among the lower courts as to whether the section 12112(a) prohibition against discrimination applies only to individuals who hold or desire, and are qualified for, a particular job, a restriction which would exclude disabled former employees.

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[11] 42 U.S.C. §§ 12112(b)(2) ("qualified applicant"), 12112(b)(4) ("qualified individual"), 12112(b)(5) ("qualified individual").

[12] 42 U.S.C. §§ 12112(b)(1) ("applicant or employee"), 12112(b)(3) ("discrimination on the basis of disability"), 12112(b)(6) ("individual with a disability"), 12112(b)(7) ("applicant or employee who has a disability"), 12112(d) ("applicant" and "employee").

Since 1997 this inter-circuit conflict has turned on a disagreement about the significance of this Court's decision in *Robinson*. The question in *Robinson* was whether section 704(a) of Title VII, which forbids retaliation against "employees" for certain protected activities, applies to former employees. The Court acknowledged that "[a]t first blush, the term 'employees' would seem to refer to those having an existing employment relationship with the employer in question." 519 U.S. at 341. But the meaning and possible ambiguity of statutory language, *Robinson* held, had to be evaluated in "the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* Read in those contexts, the Court held, "employees" could mean either current employees or former employees. *Robinson* noted in particular that there was "no temporal qualifier in the statute such as would make plain that § 704(a) protects only persons still employed at the time of the retaliation." *Id.* Since the statutory language was unclear, the Court interpreted "employees" to include former employees because that construction was "more consistent with the broader context of Title VII and the primary purpose of § 704(a)." 519 U.S. at 346.

In *Castellano v. City of New York*, 142 F.3d 58 (2nd Cir. 1998), the Second Circuit concluded that the decision in *Robinson* supported the conclusion that the ADA does apply to disabled former employees. *Robinson*, the Second Circuit noted, had held that

> the language of section 704(a) of Title VII is ambiguous and then interpreted the statutory language in light of the purposes of section 704(a) and Title VII.... This reasoning applies with equal force to the instant case.

142 F.3d at 69. The Second Circuit reasoned that in the case of the ADA there is "textual ambiguity surrounding the time at which a plaintiff must have been a 'qualified individual.'" *Id.*[13]

> An interpretation excluding from the ADA former employees or employees who can no longer perform the essential functions of their former employment would undermine the purpose of preventing disability discrimination in the provision of fringe benefits.

142 F.3d at 69. If the protections of the ADA did not apply to former employees at all,

> an employer could terminate an employee in violation of the ADA and then deny him fringe benefits, yet the employee could bring no ADA claim for the latter violation because

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[13] Section 12111(8) defines a "qualified individual with a disability" as an individual "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."...It fails to specify *when* a potential plaintiff must have been a "qualified individual with a disability" in the context of a claim that the provision of retirement or fringe benefits is discriminatory.

142 F.3d at 67 (emphasis in original).

> at the time of the discriminatory denial of fringe benefits he was a former employee who did not "hold" an "employment position."

142 F.3d at 67. If the protections of the ADA, although applicable to some former employees, were limited to those who were still able to perform their old jobs, the law

> would permit irrational discrimination as between disabled persons, some of whom (for whatever reason) could still perform the essential functions of their former employment and others of whom could not.

Id. The Second Circuit noted that the EEOC, which is primarily responsible for enforcing the employment provisions of the ADA, had concluded that the protections of the ADA apply to all former employees, including those who can no longer perform the essential functions of their old jobs. 142 F.3d at 69. The Second Circuit thus concluded that

> [b]ecause fringe benefits are earned for actual service in employment, it is irrelevant whether former employees, otherwise eligible for fringe benefits, could *also* perform such essential functions at or after termination of their employment.

142 F.3d at 68 (emphasis in original). The court of appeals expressly refused to adopt the contrary rule in the Sixth, Seventh and Eleventh Circuits. 142 F.3d at 68.

In *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), the Third Circuit also relied on this Court's decision in *Robinson* in holding that "Title I of the ADA does permit disabled individuals to sue their former employers." 145 F.3d at 608. "Our impetus for this conclusion...comes from the Supreme Court's *Robinson* decision allowing former employees to sue under Title VII." 145 F.3d at 608. The Third Circuit agreed with the Second Circuit that the ADA was ambiguous, because it did not make clear whether a covered employee must be "qualified" at the time he earns a fringe benefit or at the time he seeks that benefit.[14] The Third Circuit also reasoned that the ADA was ambiguous because there was "an internal contradiction in the ADA itself." 145 F.3d at 605. Section 12112(b)(2) expressly forbids discrimination with regard to fringe benefits, some of which (as in the instant case) are provided only to former employees, while section 12111(8) defines "qualified individual" in a manner that seems to refer to current employees or applicants.

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[14] The locus of the ambiguity is whether the ADA contains a temporal qualifier of the term "qualified individual with a disability[.]" If the putative plaintiff must, at the time of the suit, be employable with or without a reasonable accommodation, then a disabled former employee loses his ability to sue to challenge discriminatory disability benefits. Alternatively, the term "qualified individual with a disability" may include former employees who were once employed with or without reasonable accommodations yet who, at the time of suit, are completely disabled.

145 F.3d at 606.

> This disjunction between the explicit rights created by Title I of the ADA and the ostensible standards for filing suit under Title I causes us to view the contents of those requirements as ambiguous.

145 F.3d at 606.

The interpretation of Title VII in *Robinson*, the Third Circuit reasoned, supported a similar construction of the ADA.

> The Supreme Court's recent decision in *Robinson*, which concerned the scope of Title VII..., contributes to this ambiguity by lending support for interpreting Title I of the ADA to permit suits by disabled individuals against their former employers.... Cases interpreting Title VII are relevant to our analysis of the ADA because the ADA is essentially a sibling statute of Title VII.... Our decision is...in keeping with the Supreme Court's *Robinson* decision, which found that the temporal reach of Title VII encompasses former employees....

145 F.3d at 606-07. The Third Circuit emphatically rejected the decisions of several other circuits which had held that the ADA does not protect former employees.

> By adopting this interpretation, we part ways with the Seventh and Eleventh Circuits, both of which tendered decisions prior to *Robinson*. In *EEOC v. CNA Ins. Companies*,

> 96 F.3d 1039 (7th Cir. 1996),...the Seventh Circuit's brief analysis conflates two issues, the first being whether the individual could sue regarding fringe benefits while completely disabled, and the second being whether the individual's suit had merit.... [W]e do not find the Seventh Circuit's reasoning persuasive....
>
> We also disagree with the Eleventh Circuit's ruling in *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (11th Cir. 1996).... The Eleventh Circuit...failed to address the possibility that the disparity between the rights created by the ADA and the apparent legal remedy fashioned by the ADA creates an ambiguity in the eligibility requirements for obtaining a remedy.... [W]e respectfully disagree with the...sister courts of appeals.

145 F.3d at 607-08.

In *Johnson v. K Mart Corp.*, 273 F.3d 1035 (11th Cir. 2001), the Eleventh Circuit divided sharply about the significance of *Robinson*. Prior to *Robinson* the Eleventh Circuit had ruled that the ADA does not protect a disabled former employee. *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (11th Cir. 1996). In *Johnson* a panel of the Eleventh Circuit concluded that *Gonzales* was bad law after *Robinson*, and held that "a former employee...is entitled to bring a claim against his former employer under § 12112(a) of Title I of the ADA." 273 F.3d at 1048. A majority of the panel reasoned that *Robinson* had fatally undermined the rationale of *Gonzales*.

> [T]he part of *Gonzales* wherein we decided that the meaning of the term "employees" in § 12111(4) plainly excluded former employees has been undermined by *Robinson*.... *Robinson* also undermines this court's previous finding that the term "discriminate," as defined in § 12112(b), plainly excludes former employees.... In light of the Court's emphasis in *Robinson* on the importance of temporal qualifiers, we must now acknowledge that it is hard to argue that §§ 12112(b)(1)-(b)(3) unambiguously contemplate discrimination encountered solely by job applicants and/or current employees.... [O]ur reliance in *Gonzales* on the legislative history of the ADA does not withstand the analysis in *Robinson*.

273 F.3d at 1044-48. The court expressly disagreed with the Ninth Circuit's refusal to apply *Robinson* to the ADA. 273 F.3d 1047.[15] A concurring opinion emphasized that "*Robinson*...clearly abrogates *Gonzales*." 273 F.3d at 1060 (Barkett, J., concurring).

> *Robinson* explicitly invalidates several of the propositions that informed...*Gonzales*.... [T]he *Robinson* Court, analyzed the same terms we examined in *Gonzales* and found these terms to be ambiguous.... [T]here is no doubt that the *Robinson* Court's decision

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[15] "Based on our reading of *Robinson*, we are convinced that...the Ninth Circuit in *Weyer* [*v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000)]...found more clarity in the language of § 12111(8) than is justified."

> invalidates *Gonzales*.... *Robinson* clearly invalidates our analysis in *Gonzales*.

273 F.3d at 1060-65. One member of the panel dissented, arguing that *Robinson* did not warrant the majority's decision to disregard the earlier Eleventh Circuit precedent in *Gonzales*. Although *Robinson* might have "weakened" the rationale of *Gonzales* and could "provide a springboard for the en banc court to reconsider settled circuit law," it had not "overruled" *Gonzales*. 273 F.3d at 1067-70 (Carnes, J., dissenting).[16] The Eleventh Circuit subsequently voted to rehear *Johnson* en banc. 273 F.3d at 1070. That rehearing has been stayed pending resolution of the bankruptcy proceedings regarding the defendant employer. *Johnson v. K Mart Corp.*, 281 F.3d 1368 (11th Cir. 2002).

Since this Court's decision in *Robinson*, on the other hand, the Sixth, Seventh and Ninth Circuits have taken the opposite position, holding that the ADA does not protect disabled former employees.[17]

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[16] The dissenting judge "express[ed] no view on how I would vote to decide the ADA coverage issue if we were reconsidering it en banc." 273 F.3d at 1070.

[17] The Eighth Circuit has held that disabled former employees are not protected from discrimination by the Rehabilitation Act of 1973. *Beaufort v. Father Flanagan's Boys' Home*, 831 F.3d at 768 (8th Cir. 1987). That circuit has not addressed this issue under the ADA, and has not considered the implications for either statute of this Court's decision in *Robinson*.

In the instant case the Sixth Circuit refused to apply the reasoning of *Robinson* to claims under the ADA, instead adhering to the Sixth Circuit's pre-*Robinson* decision in *Parker v. Metro. Life Ins. Co.*, 99 F.3d 181 (6th Cir. 1996) ("*Parker I*").

> Plaintiffs urge this court to reconsider *Parker I*'s conclusion in light of *Robinson*.... We decline to do so.... [T]he Ninth Circuit [in *Weyer*] reaffirmed the view held...prior to *Robinson*: the plain, unambiguous language of Title I does not permit disabled former employees to bring suit under the act.... The Seventh Circuit has also joined the Ninth Circuit in adopting the majority position post-*Robinson*.... [W]e do not think that *Robinson* requires a decision contrary to *Parker I*.

(15a-21a). If a retired worker was sufficiently disabled to qualify for SSDI, the court below reasoned, the worker would not be a "qualified individual with a disability." (9a). "[The ADA] does not apply to former employees who are unable to perform the essential functions of their jobs." (21a). The requirement that disabled individuals be able to perform "the essential functions of their jobs" applied to retired workers, the Sixth Circuit insisted, even though those individuals by definition have no job functions to perform. The court below insisted that this paradoxical requirement was mandated by the "unambiguous...plain language of the ADA." (21a). Because of the asserted clarity of the ADA, the court of appeals held that this

Court's decision in *Robinson* was inapplicable to the ADA. (21a).

The Sixth Circuit expressly rejected the contrary holdings of the Second and Third Circuits in *Castellano* and *Ford*, dismissing the analysis of those circuits as "tenuous at best" (20a), and objecting that "[t]he circularity of this reasoning is apparent." (20a n.5, quoting *Parker I*, 99 F.3d at 186 (6th Cir. 1996)). The court of appeals below criticized the Third Circuit decision in *Ford* because it "appears to have disregarded the plain language of the statute." (20a).

In *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000), the Ninth Circuit also rejected the argument that under the standard established by *Robinson* former employees are protected by the ADA. *Robinson* is inapplicable to the ADA, the court of appeals reasoned, because the plain language of the ADA does not cover former employees.

> Title I...unambiguously excludes former employees. A "qualified individual" is one who "can perform the essential functions of the employment position that such individual *holds* or *desires*." "Holds," in the present tense, refers to current employees. Likewise, "desires," in the present tense, refers to people who presently want jobs as opposed to...those no longer able to work....

198 F.3d at 1112 (emphasis in original). The Ninth Circuit thus concluded that the ADA was enacted solely "to enable disabled people who can work with

reasonable accommodation to get and keep jobs," not to "equalize post-employment fringe benefits for people who cannot work." 198 F.3d at 1112. The court of appeals expressly disagreed with the decisions of the Second and Third Circuits in *Castellano* and *Ford*.

> The Second and Third Circuits have...held...that former employees must be included [within the protections of the ADA.]... We reject this view.... We cannot accept the Third Circuit's view, that we should construe Title I contrary to what it says....

198 F.3d at 1111-12.

In *Morgan v. Joint Administration Board*, 268 F.3d 456 (7th Cir. 2001), the Seventh Circuit rejected the argument that *Robinson* required that circuit to reconsider its pre-*Robinson* decision holding that the ADA does not protect disabled former employees. See *EEOC v. CNA Ins. Companies*, 96 F.3d 1039 (7th Cir. 1996). Writing for the panel, Judge Posner concluded that disabled former employees would be *worse off* if they were protected by the ADA, because that would create an economic incentive for employers to refuse to establish any retirement benefit programs for disabled former employees.[18] The Seventh Circuit insisted that

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[18] Allowing former employees to complain about postemployment discrimination...would actually hurt them.... [I]t would create perverse incentives. Since there is no legal requirement that employers offer disability benefits as part of their menu of fringe benefits,...[t]he employer

(Continued on following page)

its earlier decision had already "anticipated" and rejected the rationale of *Robinson*, and refused to follow the decisions in the Second and Third Circuits that in light of *Robinson* "retired employees are protected by the ADA after all." 268 F.3d at 458.

The existence of this well-established inter-circuit conflict is widely recognized. The Sixth Circuit below candidly acknowledged that whether the ADA protects disabled former employees

> is an issue that has divided the circuits. The Second and Third Circuits take the minority position – that former employees who are totally disabled can be considered "qualified individuals" with standing to bring suit under [the ADA].... The majority position – that former disabled employees cannot be considered "qualified individuals" – has been explicitly adopted by the Ninth and Seventh Circuits.

(9a; see 15a (panel "decline[d]" to "join the Second and Third Circuits")). In *Ford* then Judge Alito noted that the courts of appeals were "divided" on this issue. 145 F.3d at 615. In *Johnson* the panel recognized that

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> would tell its employees to buy their own disability insurance.... Since workers with a disability are more likely than other workers to become totally disabled and have to retire early, an interpretation of the Act that discouraged employers from offering disability benefits would make the workplace less attractive to such workers.

268 F.3d at 458.

there is a "fractured series of decisions rendered by the court of appeals," 273 F.3d at 1068, noting that the Second and Third Circuits had held the ADA protects disabled former employees, while the Seventh and Ninth Circuits had taken the opposite position. 273 F.3d at 1068 n.4. In his dissenting opinion in *Johnson*, Judge Carnes argued that

> Judge Barkett obviously disagrees with the conclusions of Judges Flaum, Posner, and Williams of the Seventh Circuit in *Morgan* and of Judges Beezer, Wiggins, and Kleinfeld of the Ninth Circuit in *Weyer*, but the fact that there is a disagreement, and a two-to-two split of the other circuits that have addressed the issue since *Robinson* was released proves that there is substantial doubt about whether *Robinson* overruled or undermined to the point of abrogation the *Gonzales* decision.

273 F.3d at 1070 (Carnes, J., dissenting).[19] In *Weyer* the Ninth Circuit explained that "[w]e cannot avoid an inter-circuit conflict, because the Second and Third Circuits have held contrary to the Seventh and Eleventh Circuits." 198 F.3d at 1112.

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[19] See 273 F.3d at 1069 (dissenting opinion):

> A couple of other circuits in post-*Robinson* decisions have reached conclusions on the coverage issue that are different from the Ninth Circuit's in *Weyer* and the Seventh Circuit's in *Morgan*.... *Ford v. Schering-Plough Corp.*... *Castellano v. City of New York*....

Nine district court decisions have noted the existence of this inter-circuit conflict. *Hatch v. Pitney Bowes, Inc.*, 485 F.Supp.2d 22, 27 (D.R.I. 2007) ("[the] Courts of Appeal that have rendered decisions are unambiguously split on this issue"); *Hatch v. Pitney Bowes, Inc.*, 2005 WL 5394399 at *15 (D.R.I. 2005) ("the issue has produced a split among the circuits which have addressed it"); *Fletcher v. Tufts University*, 367 F.Supp.2d 99, 105 (D.Mass. 2005) (noting "the split of authority on this issue," contrasting decisions in the Seventh and Ninth Circuits with decisions in the Second and Third Circuits); *Iwata v. Intel Corporation*, 349 F.Supp.2d 135, 146-47 (D.Mass. 2004) (contrasting decisions in the Second and Third Circuits with contrary decisions in the Sixth, Seventh, Eighth and Ninth Circuits); *Heston v. Underwriters Laboratories, Inc.*, 297 F.Supp.2d 840, 843 (M.D.N.C. 2003) (noting "the split in case law" between the rule in the Seventh and Eleventh Circuits and the contrary rule in the Second and Third Circuits); *EEOC v. Group Health Plan*, 212 F.Supp.2d 1094, 1098 (E.D.Mo. 2002) ("[t]he Circuit Courts of Appeal are split on the issue of what effect *Robinson* has on the question of whether former employees are covered under the ADA"); *Fitts v. Federal National Mortgage Ass'n*, 44 F.Supp.2d 317, 321 (D.D.C. 1999) ("a split exists among the circuits"); *Conners v. Maine Medical Center*, 42 F.Supp.2d 34, 45 (D.Me. 1999) ("this Court declines to follow the Seventh and Eleventh Circuits and concurs with the decisions tendered by the Second and Third Circuits"); *Fennell v. Aetna Life Insurance Co.*, 37 F.Supp.2d 40, 42 (D.D.C. 1999)

("a split exists among the circuits as to whether a totally disabled former employee can bring a Title I [of the ADA] challenge").[20]

The EEOC, which is responsible for enforcing the employment discrimination provisions contained in Title I of the ADA, has consistently construed section 12112(a) to forbid discrimination against disabled former employees. The Commission has filed amicus briefs in five courts of appeals emphatically advancing that interpretation of the ADA.[21] The EEOC's Compliance Manual states that

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[20] In addition, the Massachusetts Commission Against Discrimination had noted the existence of this conflict in federal law.

> Courts across the country have split on the issue of whether an employee who brings a claim alleging discrimination in the provision of [employer-provided long-term disability] benefits must first demonstrate that he or she is qualified to perform the essential functions of his or her job. Compare...*Ford v. Schering-Plough Corp.*... *Castellano v. City of New York*...with *Parker v. Metropolitan Life Ins. Co.*....

Samartin v. Metropolitan Life Ins. Co., 2005 WL 2993469 at *3 (2005).

[21] Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of the Plaintiffs-Appellants, *Weyer v. Twentieth Century Fox Film Corp.*, 1998 WL 34082429 (9th Cir.); Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of the Appellant, *Ford v. Schering-Plough Corporation*, 1997 WL 33551474 (3d Cir.); Brief of the Equal Employment Opportunity Commission as Amicus Curiae, *Castellano v. The City of New York*, No. 96-7920 (2d Cir.); Brief of the Equal Employment Opportunity Commission as Amicus

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> [w]here an employer establishes either [a disability retirement or service retirement] plan[ ],...it may not discriminate against employees with disabilities.... As long as all employees may participate in the service retirement plan on the same terms, regardless of the existence of the disability, the employer will not violate the ADA....

(Compliance Manual, section 3, "ADA Issues" part V).[22] The Manual contains a section devoted exclusively to the non-discrimination requirements which the EEOC maintains are applicable to disability and service retirement plans. *Id.* ("Disability and Service Retirement Plans"). The Commission has filed suit under the ADA against private employers to prevent discrimination against disabled former employees[23] and has gone to court to enforce its subpoena power to investigate discrimination against such former employees.[24]

Curiae, *Gonzales v. Garner Fast Foods, Inc.*, 1995 WL 17057641 (11th Cir.); Brief of the Equal Employment Opportunity Commission, as Amicus Curiae, *Parker v. Metropolitan Life Ins. Co.*, 1995 WL 17809733 (6th Cir.).

[22] Available at http://www.eeoc.gov/policy/docs/benefits.html (visited Feb. 3, 2009).

[23] *EEOC v. CNA Insurance Companies*, 96 F.3d 1039 (7th Cir. 1996); *EEOC v. Deloitte & Touche, LLP*, 2000 WL 1024700 (S.D.N.Y. 2000).

[24] *EEOC v. Group Health Plan*, 212 F.Supp.2d 1094 (E.D.Mo. 2002).

In its brief in *Castellano*, the EEOC cogently explained the importance of this recurring issue. The district court in that case, like the Sixth Circuit in the instant case, had

> held that individuals may not challenge discrimination in the provision of post-employment benefits if they can no longer perform their former jobs. If upheld on this ground, the court's decision would insulate blatantly discriminatory benefit programs from challenge under Title I of the ADA whenever the discrimination is directed at former employees. Such a result, in our view, would subvert Congress' intent to prohibit disability discrimination in the provision of benefits.

Brief of the Equal Employment Opportunity Commission as Amicus Curiae, *Castellano v. The City of New York*, No. 96-7920 (2d Cir.) at 1-2.

> The language of the ADA indicates that Congress clearly intended to prohibit disability-based discrimination in the provision of employment-related benefits.... [M]any of the most essential fringe benefits that employers provide to their employees are, by definition, unavailable until the employee has stopped working. Not only pension benefits, but also long-term disability benefits, retiree health benefits, health insurance continued under COBRA, and deferred compensation plans,

> for example, are only available after an employee has retired or ceased working.

Id. at 8-9.

In its amicus brief in *Ford*, the EEOC pointed out that excluding disabled former employees from the protections of the ADA "would leave a substantial, arbitrary gap in coverage for benefit discrimination." Brief of the EEOC as Amicus Curiae, 1997 WL 33551474 at *7. The lower courts have repeatedly recognized the inequity of the gap created by the rule applied in this case, which withholds the protections of the ADA from disabled retired workers at the very point when they are most dependent on their fringe benefits.[25] That is precisely the type of unwarranted loophole in a major federal employment law which the United States suggested warranted a grant of certiorari in *Crawford v. Metropolitan Government of Nashville and Davidson County*, ___ U.S. ___ (2009). Brief of the United States as Amicus Curiae, No. 06-1595, at 18 ("The decision below creates an inexplicable gap in Title VII's anti-retaliation provision.")

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[25] *Hatch v. Pitney Bowes, Inc.*, 485 F.Supp.2d 22, 32 (D.R.I. 2007) (excluding former employees from the protections of the ADA would "create a remedial gap in Title I's statutory scheme, because Title I guarantees the right to be free from discrimination in the provision of fringe benefits"); *Lewis v. Aetna Life Ins. Co.*, 982 F.Supp. 1158, 1163 (E.D.Va. 1997) (excluding disabled former employees from protections of the ADA would create an "enormous...gap in the protection afforded by Title I [that] would be clearly at odds with the expressed purpose of the ADA").

This issue is ripe for resolution by this Court. The conflict has existed for more than a decade, since *Castellano* and *Ford* were decided shortly after this Court's decision in *Robinson*. In *Castellano* and *Ford* the Second and Third Circuits expressly considered and rejected the holding and reasoning of the contrary decisions in the Sixth, Seventh and Eleventh Circuits. In the instant case, *Morgan*, and *Weyer*, the Sixth, Seventh and Ninth Circuits expressly considered and rejected the holding and reasoning of the contrary decisions in the Second and Third Circuits. This issue has arisen in a variety of different circumstances, thus informing this Court's understanding of the implications and ramifications of these conflicting interpretations of the ADA. The circuit court decisions, although reaching sharply inconsistent results, have aired in a thorough and thoughtful manner the range of considerations bearing on the proper interpretation of the ADA. No purpose would be served by deferring action by this Court to definitively resolve this recurring and important question.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT

The retirement plans at issue in this case do not reduce the early retirement benefits of non-disabled retirees who have jobs, no matter how much they earn or for whom they work. The plans do, however, greatly reduce the retirement benefits of disabled retirees solely because they receive federal SSDI

benefits. The SSDI benefits which trigger that loss of retirement benefits would often be substantially less than what a non-disabled retiree – without any reduction in retirement benefits – would earn in a full time job. The Sixth Circuit held that the ADA permits such discrimination so long as disabled workers have "access" to the retirement plan. That crabbed interpretation of the ADA is in square conflict with this Court's consistent interpretation of the ADA and of the Rehabilitation Act on which it was based.

The distinction made by General Motors between disabled and non-disabled workers is clear. The income of non-disabled retirees is not subject to reduction based on their post-retirement earnings. They may earn as much as they can from whomever they please – General Motors, a competing automobile company, the Social Security Administration – without forfeiting a penny of their retirement benefits. If a retiree who took such a job and was later laid off receives unemployment compensation, his or her benefits are not reduced. If a retiree who took such a job was fired for some unlawful reason and subsequently wins an award of back pay, his or her benefits are not reduced. A benefit reduction is imposed, however, if a disabled retiree receives SSDI benefits.

This distinction is permitted by the ADA, the Sixth Circuit insisted, because the ADA requires only that disabled and non-disabled workers have "equal access to the same benefit plan." (24a). The Sixth Circuit's "equal access" standard was an exceptionally undemanding one. The ADA, on the Sixth Circuit's

view, required only that disabled workers be given "the option of rejecting" SSDI benefits in order to obtain the full retirement benefits, even though non-disabled workers are not required, as a condition of receiving the same benefits, to reject wages from post-retirement employment. (23a). On the Sixth Circuit's interpretation of the ADA, General Motors could adopt a policy of permitting most retirees to have post-retirement earnings, but cancelling the retirement benefits for any blind retiree who took a job; that would be "equal access" under the ADA because the blind retirees would have "the option of rejecting" any job offers, and could thereby continue to receive the same retirement benefits as gainfully employed sighted retirees.

The Sixth Circuit "equal access" rule reads into the ADA a severe restriction that is manifestly inconsistent with the decisions of this Court regarding ADA and the Rehabilitation Act from which the ADA derived. The Court has never imposed any such limitation on the federal prohibition against disability-based discrimination. The core requirement of that anti-discrimination principle, this Court has repeatedly held, is that "handicapped individuals receive 'even-handed treatment' in relation to nonhandicapped individuals." *Traynor v. Turnage*, 485 U.S. 535, 548 (1988).[26] The requirement of "evenhanded treatment" is not limited to evenhandedness in *what* benefits are

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[26] *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979) ("evenhanded treatment").

available; it is equally applicable to the *conditions* which disabled and non-disabled individuals must meet to obtain the same benefit. Where, as here, only disabled retirees must forsake outside income to obtain the full General Motors retirement benefits, the program "treat[s] handicapped persons less favorably than nonhandicapped persons." *Traynor*, 485 U.S. at 548. The ADA, like the Rehabilitation Act, is "concerned...with discrimination in the *relative* treatment of handicapped and non-handicapped persons." *Bowen v. American Hospital Association*, 476 U.S. 610, 641 (1986) (quoting Brief for the United States) (emphasis in original).

In *Olmstead v. Zimring*, 527 U.S. 581 (1999), this Court rejected a proposed construction of Title II of the ADA that is indistinguishable from the interpretation of Title I adopted by the Sixth Circuit in the instant case. The plaintiffs in *Olmstead* were mentally disabled patients complaining that they, unlike non-disabled patients, could only obtain medical treatment if they agreed to live in a state institution. The defendants in *Olmstead* suggested that this treatment of the disabled plaintiffs did not constitute discrimination within the meaning of the ADA because the plaintiffs could obtain access to needed medical treatment by agreeing to reside in such an institution. This Court rejected that argument, holding that the defendant's practice was discriminatory because it imposed on disabled individuals seeking medical treatment a burden not imposed on non-disabled individuals.

> [C]onfinement in an institution severely diminishes the everyday life activities of individuals, including...work options.... In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.

527 U.S. at 601. Like the practice held unlawful in *Olmstead*, the General Motors plan discriminates against disabled retires by requiring them – as a condition of receiving full early retirement benefits – to "relinquish [substantial outside income], while persons without...disabilities can receive [full early retirement benefits] without similar sacrifice."

In *Olmstead* the United States correctly pointed out that the practice at issue in that case "imposes a substantial burden on persons with disabilities that the State does not impose on persons without disabilities." (Brief for the United States as Amicus Curiae Supporting Respondents, No. 98-536, at 17, 1999 WL 149653). The practice at issue in the instant case discriminates in precisely that manner. The EEOC Compliance Manual provides that under the ADA retirement plans must permit "all employees [to] participate in the service retirement plan on the same terms, regardless of the existence of a disability." See text at n.22, *supra*. The General Motors plan, which makes forfeiture of outside income a "term" imposed

on disabled workers receiving SSDI, but not imposed on non-disabled workers with outside earnings, clearly violates that standard.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit. In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

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550 F.3d 519

United States Court of Appeals, Sixth Circuit.
Leroy **McKNIGHT**, Nicholas Klayo,
Robert Griffin, Plaintiffs-Appellants,
v.
GENERAL MOTORS CORPORATION,
Defendant-Appellee.
No. 07-1479.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 05-70666 – Arthur J. Tarnow, District Judge.

Argued: May 2, 2008

Decided and Filed: December 4, 2008

Before: GUY, SUHRHEINRICH, and
GIBBONS, Circuit Judges.

COUNSEL

ARGUED: Dennis D. James, REOSTI, JAMES & SIRLIN, P.C., Pleasant Ridge, Michigan, for Appellants. David Matthew Davis, HARDY, LEWIS & PAGE, P.C., Birmingham, Michigan, for Appellee. **ON BRIEF:** Dennis D. James, Ronald J. Reosti, REOSTI, JAMES & SIRLIN, P.C., Pleasant Ridge, Michigan, for Appellants. David Matthew Davis, HARDY, LEWIS & PAGE, P.C., Birmingham, Michigan, for Appellee.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Plaintiffs-appellants Leroy McKnight, Nicholas Klayo, and Robert Griffin ("plaintiffs") are former employees of General Motors Corporation ("GM") who accepted the early retirement option provided in GM's pension plans. Each plaintiff also applied for, and received, Social Security Disability Insurance Benefits ("SSDIB") following retirement. Pursuant to provisions of the GM pension plans, plaintiffs' retirement benefits were reduced by the amount received from the government in SSDIB benefits. The primary issue on appeal presents, in part, a question over which the circuits are split: whether disabled former employees have standing under Title I of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), to bring suit against their former employers for discrimination with respect to the payment of post-employment fringe benefits. Plaintiffs contend that such employees do have standing under the ADA, and, moreover, GM's pension plans do not provide equal access to disabled and non-disabled employees. The district court disagreed with plaintiff's contentions and granted summary judgment in favor of GM.

For the reasons set forth below, we conclude that the plaintiffs do not have standing under Title I of the ADA to pursue their claims. Furthermore, we note that, even if plaintiffs had standing, their claims would fail on the merits. We therefore affirm the district court.

I.

A. *The Pension Plans*

Plaintiffs challenge provisions in two pension plans offered by GM: the General Motors Hourly-Rate Employees Pension ("GM Pension Plan") and the General Motors Retirement Program for Salaried Employees ("GM Retirement Program") (collectively, "the pension plans"). The pension plans have similar provisions providing for the payment of basic and supplemental benefits to individuals choosing to retire early after thirty years of service. Both pension plans also provide for a reduction in supplemental benefits if a beneficiary becomes eligible for SSDIB prior to reaching the age of 62 and one month.

Pursuant to Article II, Section 6 of the GM Pension Plan, an employee who retires after thirty years of service will receive a monthly early retirement supplement, in addition to the basic pension payment, until age 62 and one month. Section 6 provides:

> (a) An employee who retires under Section 2 . . . and who retires within five years of the last day worked for the Corporation will receive, in addition to the pension, certain supplements as set forth below:
>
> (1) If the employee retires under Section 2 or Section 3 of this Article II with 30 or more years of credited service at the date of retirement, such employee shall be entitled to a monthly early retirement supplement until age 62 and one month in an amount which when added to the monthly pension

> under this Plan will equal the amount of total monthly benefit provided in the table set forth below, subject to subsequent provisions of this Section 6: [table omitted].

The plan further provides for a reduction in supplemental benefits if, prior to the age of 62 and one month, the employee becomes eligible for SSDIB:

> (b) The early retirement supplement under provision (a)(1) of this Section 6 for an employee who retires at the employee's option shall be calculated assuming that the basic pension commences immediately after retirement, and such early retirement supplement and the interim supplement under provisions of (a)(2) of this Section 6 shall be reduced for any month prior to age 62 and one month, for which the employee becomes or could have become eligible for a Federal Social Security benefit, by an amount equal to the amount of the temporary benefit to which the employee would have been entitled if retired under Section 2(b) of this Article II.

Similarly, the GM Retirement Program also provides for basic and supplemental benefit payments and contains a nearly identical passage allowing for the reduction of supplemental benefits in light of SSDIB eligibility:

> (b) The early retirement supplement under subsection (a)(1) of this Section 7 for an employee who retires voluntarily shall be calculated assuming that the basic benefit commences immediately after retirement, and such early retirement supplement under

> subsection (a)(2) of this Section 7 shall be reduced for any month prior to age 62 and one month for which the employee becomes or could have become eligible for a Federal Social Security benefit, by an amount equal to the amount of the temporary benefit to which the employee would have been entitled if retired under Section 4 of this Article I.

In both pension plans, the "temporary benefit" – the amount by which the supplemental benefit is reduced – is apparently about equal to the amount the beneficiary receives from the government in the form of SSDIB.[1] The district court explained the significance of this plan structure: "Both the Pension Plan and the Retirement Program were designed to achieve what is referred to as 'benefit integration' with Social Security benefits. Benefit integration permits a higher level of income to all retired/disabled employees by allowing benefits under such plans to take credit for other income streams that a participant may be entitled to receive."

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[1] Although the plaintiffs suggest that the entire supplemental benefit payment is terminated upon eligibility for SSDIB, this does not appear to be the case. As the chart detailing the payments received by Leroy McKnight indicates, the supplemental benefit is reduced by the amount the beneficiary receives from the government in SSDIB (the "temporary benefit"), and, if the SSDIB amount is less than the supplemental benefit payment due to the beneficiary, GM continues to provide the remaining portion of the supplemental benefit.

B. *The Plaintiffs*

Leroy McKnight worked for GM as an hourly employee until January 31, 2000. On February 1, 2000, McKnight retired under the GM Pension Plan after completing more than thirty years of service. In November 2000, McKnight began receiving SSDIB benefits, and, accordingly, GM reduced McKnight's supplemental pension payments. GM also claims that, as a result of McKnight's SSDIB eligibility, it overpaid McKnight $10,489.50.

Robert Griffin worked for GM as a salaried employee for twenty-six years and, subsequently, transferred to American Axle and Manufacturing, Inc. After more than thirty total years of service, Griffin retired on December 1, 1998, and he now receives a retirement benefit from the GM Retirement Program for his twenty-six years of GM credited service. Griffin was awarded SSDIB effective April 1, 1999, and his retroactive award resulted in an overpayment by GM of $30,446.40 in supplemental benefits.

Also a former salaried GM employee, Nicholas Klayo retired on January 1, 1999, under the GM Retirement Program, after thirty years of credited service. Klayo was awarded SSDIB effective December 1, 2001, and his retroactive award resulted in an overpayment by GM of $35,166.96 in supplemental benefits.

Plaintiff Carol Dudek does not appeal the decision of the district court.

C. *Procedural History*

On October 17, 2005, plaintiffs filed an amended complaint in federal district court, alleging that GM's enforcement of the GM Pension Plan and the GM Retirement Program violated the ADA, the Employee Retirement Income Security Act ("ERISA"), and Michigan's Persons With Disabilities Civil Rights Act. On August 29, 2006, GM filed a motion for summary judgment. The district court granted GM's motion on March 20, 2007. The district court concluded that plaintiffs did not have standing under Title I of the ADA, and, even if they did have standing, plaintiffs had no viable ADA claim, as they had equal access to GM's pension plans. The court further found that GM's pension plans did not violate ERISA. Finally, the court declined to exercise supplemental jurisdiction over plaintiffs' state law claims. On appeal, plaintiffs challenge the district court's decision only with respect to their claim under Title I of the ADA.

II.

We review the district court's grant of summary judgment *de novo*. *Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539, 546 (6th Cir. 2008). Summary judgment will be affirmed if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). If "a reasonable jury could return a verdict for the

nonmoving party," summary judgment for the moving party is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In reviewing the district court's decision, we draw all justifiable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III.

Pursuant to Title I of the ADA, an employer is prohibited from discriminating against a "qualified individual with a disability" with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The Act defines a "qualified individual" as someone "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). "The plain language of the Act thus allows only those who are 'qualified individuals' to bring suit." *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1108 (9th Cir. 2000). Accordingly, we must first resolve the threshold issue of whether plaintiffs – former GM employees who have been adjudged disabled by the Social Security Administration – are qualified individuals with standing under Title I of the ADA.

A.

Whether disabled former employees are "qualified individuals" under Title I is an issue that has divided the circuits. The Second and Third Circuits take the minority position – that former employees who are totally disabled can be considered "qualified individuals" with standing to bring suit under Title I. *See Ford v. Schering-Plough Corp.*, 145 F.3d 601, 607 (3d Cir. 1998); *Castellano v. City of New York*, 142 F.3d 58, 60 (2d Cir. 1998). The majority position – that former disabled employees cannot be considered "qualified individuals" – has been explicitly adopted by the Ninth and Seventh Circuits. *See Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 457-58 (7th Cir. 2001); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1110 (9th Cir. 2000); *see also Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1161-62 (10th Cir. 1999) (seemingly adopting majority position in *dicta*). This court and others have also addressed the issue, but prior to the issuance of a potentially relevant Supreme Court decision, *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). *See Parker v. Metro. Life Ins. Co.*, 99 F.3d 181, 186 (6th Cir. 1996) (articulating majority position) ("*Parker I*"), *opinion vacated and decided on other grounds*, 121 F.3d 1006 (6th Cir. 1997) (*en banc*) ("*Parker II*"); *Gonzales v. Garner Food Servs., Inc.*, 89 F.3d 1523, 1531 (11th Cir. 1996) (same);[2] *see also Beauford v. Father Flanagan's Boys'*

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[2] *Gonzales* was overruled by *Johnson v. K Mart Corp.*, 273 F.3d 1035 (11th Cir. 2001), in light of *Robinson*. However, the

(Continued on following page)

Home, 831 F.2d 768, 771-72 (8th Cir. 1987) (articulating majority view in Rehabilitation Act context).

1.

In *Parker I,* this court examined, *inter alia,* whether an employer's long term disability plan, which provided different benefits for mental disabilities and physical disabilities, violated Title I of the ADA. 99 F.3d at 183. The *Parker I* panel upheld the district court's determination that the plaintiff, a disabled former employee, lacked standing under Title I of the ADA because she was not a "qualified individual with a disability" under the ADA. *Id.* at 185. The court explained,

> Under the District Court's interpretation of the plain meaning of that statute, [the plaintiff] was at no time a "qualified individual with a disability." At the time she could "perform the essential functions" of her job, she was not disabled for purposes of her long term disability claim, and therefore was not covered by the Disabilities Act, and at the time her insurance benefits were terminated, she could no longer perform her job.

Johnson opinion was vacated when the Eleventh Circuit granted rehearing *en banc.* The case has not yet been heard *en banc,* it has been held in abeyance until the resolution of the K Mart bankruptcy. *See Johnson v. K Mart Corp.,* 281 F.3d 1368 (11th Cir. 2002). Thus, it appears that *Gonzales* is the last word on this issue from the Eleventh Circuit.

Id. at 186. Agreeing with this reasoning, the court relied in part on *Beauford v. Father Flanagan's Boys' Home*, a case in which the Eighth Circuit found that similar language in the Rehabilitation Act did not apply to disabled employees unable to perform the essential functions of their jobs. *Id.* (citing *Beauford*, 831 F.2d at 771-73). The *Parker I* court further noted that the legislative history of the ADA also supported this interpretation of "qualified individual": "The legislative history . . . indicates that the main purpose of Title I was to ensure that disabled persons could obtain and keep employment, and therefore, it was not intended to provide relief for [the plaintiff]." *Id.*

In *Parker I,* the EEOC argued in an *amicus* brief that the statutory language of 42 U.S.C. § 12112(b)(2) indicates that a former employee who can no longer perform his job is a "qualified individual with disabilities." *Id.* Section 12112(b)(2) explains that the term "discriminate" includes "participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with . . . an organization providing *fringe benefits* to an employee of the covered entity . . .)." 42 U.S.C. § 12112(b)(2) (emphasis added). This provision, the EEOC argued, indicates that Congress intended the ADA to cover discrimination in the provision of fringe benefits; accordingly, "the fact that [a narrow interpretation of 'qualified individual'] would bar most employees from

challenging discrimination in the provision of long-term disability benefits strongly suggests that [this interpretation] is incorrect." *Parker I,* 99 F.3d at 186. The *Parker I* court rejected this argument, noting that "[t]he circularity of this reasoning is apparent." *Id.*

Additionally, the *Parker I* court rejected the plaintiff's contention that she was a "qualified individual" because she had the "employment position" of a "benefit recipient."[3] *Id.* The court dismissed this argument as mere "creative thinking," as "benefit recipient" does not appear anywhere in the statute itself. *Id.* at 186-87. Ultimately, the court relied on the plain language of the statute, concluding, "We should not try to rewrite the statute in a way that conflicts with what appears to be fairly clear language." *Id.* at 187. Any remedial gap resulting from this plain language, the court explained, "is for Congress to remedy." *Id.*

The *Parker I* opinion was technically vacated by this court's grant of rehearing *en banc.* The *en banc* court, however, did not address the Title I issue, noting that "Parker did not seek rehearing on the disposition of her Title I claim." *Parker II,* 121 F.3d at 1009 n.2. Although the *en banc* decision did not

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[3] As noted above, a "qualified individual" is someone "with a disability who, with or without reasonable accommodation, can perform the essential functions of the *employment position* that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added).

address the Title I claim, the decision did fully affirm the district court's judgment. *Id.* 1019. We also note that other courts have relied on the *Parker I* panel's Title I discussion even after the opinion was vacated. *See Fobar v. City of Dearborn Heights,* 994 F. Supp. 878, 882-83 (E.D. Mich. 1998); *see also Weyer,* 198 F.3d at 1109; *Hatch v. Pitney Bowes, Inc.,* 485 F. Supp. 2d 22, 31-32 (D.R.I. 2007); *EEOC v. Group Health Plan,* 212 F. Supp. 2d 1094, 1097 & n.6 (E.D. Mo. 2002).

2.

Plaintiffs assert that, regardless of its precedential status, the *Parker I* panel's discussion of Title I should be revisited in light of *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997). In *Robinson,* the Supreme Court considered whether the plaintiff in a Title VII action could sue his former employer for postemployment actions allegedly taken in retaliation for the plaintiff's filing of an EEOC claim. *Id.* at 339. The Court held in favor of the plaintiff, concluding that former employees are covered by section 704(a) of Title VII. *Id.* at 346.

In reaching this conclusion, the Court laid out a roadmap for statutory interpretation. The Court began:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.

> Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent." . . .
>
> The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.

Id. at 340-41 (internal citations omitted). While "at first blush, the term 'employees' in § 704(a) would seem to refer to those having an existing employment relationship with the employer in question," the Court explained that this narrow interpretation of the term cannot withstand scrutiny in the context of § 704(a). *Id.* at 341. Specifically, the Court noted, neither § 704(a) nor Title VII's definition of "employee" contains any "temporal qualifier" indicating that § 704(a) only applies to former employees. *Id.* at 341-42. Furthermore, the Court observed, while some provisions of Title VII clearly used the term "employees" to mean "current employees," other sections used the word to mean something more inclusive than "current employees." *Id.* at 342-43. The Court concluded, "once it is established that the term 'employees' includes former employees in some sections, but not in others, the term standing alone is necessarily ambiguous." *Id.* at 343.

Having found that the term "employees" as used in § 704(a) is ambiguous, the Court resolved the ambiguity by examining "[t]he broader context provided by other sections of the statute." *Id.* at 345. In

determining that "employees" includes former employees, the Court noted that several other sections of the statute plainly contemplate the use of the remedial mechanisms of Title VII by former employees, and, moreover, such broad interpretation of the term comports with the purpose of the antiretaliation provisions of the statute. *Id.* at 345-46. A narrow interpretation of the term, the Court reasoned, would "vitiate much of the protection afforded by § 704(a)," as it would allow an employer "to retaliate with impunity against an entire class of acts under Title VII – for example, complaints regarding discriminatory termination." *Id.*

3.

Plaintiffs urge this court to reconsider *Parker I*'s conclusion in light of *Robinson* and join the Second and Third Circuits in holding that disabled former employees can bring suit under Title I of the ADA. We decline to do so. Rather, we adopt the majority position and conclude that former disabled employees do not have standing under Title I of the ADA.

Analyzing the question of Title I standing for disabled former employees in light of *Robinson,* both Second and Third Circuits found that Title I of the ADA was ambiguous with respect to the definition of "qualified individual with a disability." *See Ford,* 145 F.3d at 606 ("As with the term 'employees' in Title VII, the ADA contains an ambiguity concerning the definition of 'qualified individual with a disability'

because there is no temporal qualifier for that definition."); *Castellano,* 142 F.3d at 67 ("[Title I] fails to specify *when* a potential plaintiff must have been a 'qualified individual with a disability' in the context of a claim that the provision of retirement or fringe benefits is discriminatory.") Having determined that Title I was ambiguous as to the definition of "qualified individual," both courts concluded that a broader interpretation would comport with "the plain purpose of sections 12112(a) and (b)(2): to provide comprehensive protection from discrimination in the provision of fringe benefits." *Castellano,* 142 F.3d at 68; *Ford,* 145 F.3d at 607 ("We resolve this ambiguity by interpreting Title I of the ADA to allow disabled former employees to sue their former employers regarding their disability benefits so as to effectuate the full panoply of rights guaranteed by the ADA."). Thus, the Third Circuit found that the language "qualified individual with a disability" includes "disabled former employees, no longer able to work with or without reasonable accommodations." *Ford,* 145 F.3d at 608. In a similar vein, the Second Circuit held that a "qualified individual with a disability" includes a "former employee with a disability who 'with or without reasonable accommodation' could 'perform the essential functions of the employment position' for a period sufficient to establish entitlement to an employer-related fringe benefit (i.e., who is otherwise entitled to receive a fringe benefit)." *Castellano,* 142 F.3d at 69.

In contrast, in a decision subsequent to *Robinson, Ford*, and *Castellano,* the Ninth Circuit reaffirmed the view held by the majority of circuits, including this one, prior to *Robinson:* the plain, unambiguous language of Title I does not permit disabled former employees to bring a claim under the act. *Weyer,* 198 F.3d at 1112 ("We agree with the Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits that someone who is totally disabled cannot sue under Title I's unambiguous provisions."). The *Weyer* court distinguished the term at issue in *Robinson:* "Title I, unlike the section of Title VII at issue in *Robinson,* has a 'temporal qualifier.'" *Id.* The court explained:

> Title I says that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual." A "qualified individual" is someone who "*can perform.*" That definition uses the present tense. Thus, one must be able to perform the essential functions of employment at the time that one is discriminated against in order to bring suit under Title I. In addition, one must be discriminated against "because of the disability" – which requires that the disability exist at the time of the discrimination and be the motivation for the discrimination.

Id. Furthermore, the *Weyer* court noted, the words "holds" and "desires," both present-tense verbs, indicate that Title I unambiguously excludes former employees. *Id.*

The *Weyer* court deemed this interpretation to be a sensible reading of the statute, as "Congress could reasonably decide to enable disabled people who can work with reasonable accommodation to get and keep jobs, without also deciding to equalize post-employment fringe benefits for people who cannot work." *Id.* The court noted that five "compelling reasons" counsel in favor of a conclusion denying standing to disabled formed employees:

> First, the statute says so, quite plainly. Second, most circuits have said that it says so. Third, there is a sensible purpose Congress may well have had in saying so, which gives us confidence that we understand the words. Fourth, other legislation, such as ERISA, addresses fringe benefits for people unable to perform the functions of a job even with reasonable accommodations. Finally, other sections of the Act suggest that this distinction is intentional. For example, Title III of the Act regarding public accommodations applies not to "qualified individuals," but simply to any "individual."

Id. Noting that the Second and Third Circuits promote an interpretation that "construe[s] Title I contrary to what it says 'in order for the rights guaranteed by Title I to be fully effectuated,'" the *Weyer* court explained that "[i]t is rare, in a diverse democratic republic, for there to be a solid legislative majority for 'fully effectuating' any interest to the exclusion of all competing interests." *Id.* at 1113 (quoting in part *Ford*, 145 F.3d at 606). The *Weyer*

court concluded that the Second and Third Circuits' method of statutory interpretation has the potential to subvert the intent of Congress: "Legislation often results from a delicate compromise among competing interests and concerns. If we were to 'fully effectuate' what we take to be the underlying policy of the legislation, without careful attention to the qualifying words in the statute, then we would be overturning the nuanced compromise in the legislation, and substituting our own cruder, less responsive mandate for the law that was actually passed." *Id.*

The Seventh Circuit has also joined the Ninth Circuit in adopting the majority position post-*Robinson*. In a 2001 decision, the Seventh Circuit reaffirmed its prior interpretation of Title I,[4] notwithstanding the fact that "*Robinson v. Shell Oil* . . . has persuaded two of our sister circuits that retired employees are covered by the ADA after all." *Morgan*, 268 F.3d at 458. The court noted that its earlier decision had anticipated, and dismissed, the argument presented by *Robinson*. *Id.* (citing *CNA*, 96 F.3d at 1044-45). The court found that there was a "stark" difference between the question presented in *Robinson* – whether former employees could bring suit against their former employers for retaliation – and that presented in the case before the court – whether the court should "allow[] former employees to

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[4] The Seventh Circuit had previously concluded that Title I did not apply to former disabled employees in *EEOC v. CNA Insurance Cos.*, 96 F.3d 1039 (7th Cir. 1996).

complain about postemployment discrimination that does not involve retaliation." *Id.* The court further noted that the plain language of the statute supports the position that totally disabled former employees are not "qualified individuals with a disability." *Id.* at 458-59.

We agree with the position taken by the Ninth and Seventh Circuits. The Second and Third Circuits' finding of ambiguity in Title I is tenuous at best. In dismissing the reasoning of a pre-*Robinson* case finding no ambiguity in Title I, the Third Circuit stated, "[the decision] failed to address the possibility that the disparity between the rights created by the ADA and the apparent legal remedy fashioned by the ADA creates an ambiguity in the eligibility requirements for obtaining a remedy." *Ford,* 145 F.3d at 608 (also noting that "the ADA's proscription of discrimination in fringe benefits generates the need for disabled individuals to have legal recourse against such discrimination and exposes the temporal ambiguity in the ADA's definition of 'qualified individual with a disability'").[5] The *Ford* court appears to have disregarded the plain language of the statute – which does, in fact, contain temporal qualifiers, as explained above – and instead manufactured ambiguity where none existed.

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[5] This is similar to an argument rejected by the *Parker I* panel, which noted that "[t]he circularity of this reasoning is apparent." 99 F.3d at 186.

The majority position, however, comports with this court's decision in *Parker I,* and we do not think that *Robinson* requires a decision contrary to *Parker I.* The *Parker I* panel found the statute to be unambiguous, and *Robinson* did not alter the rules of statutory interpretation. Rather, the Court reiterated a well-established cannon of statutory interpretation: "Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" 519 U.S. at 340. As the majority of courts have held, Title I is unambiguous; by its plain language, it does not apply to former employees who are unable to perform the essential functions of their jobs. *See also Hatch,* 485 F. Supp. 2d at 34-35 (adopting, in a thoughtful opinion, the majority position); *EEOC v. Group Health Plan,* 212 F. Supp. 2d at 1097-99 (finding that *Robinson* did not overrule the Eighth Circuit's evaluation of the issue in the Rehabilitation Act context); *Fobar,* 994 F. Supp. at 881-84 (holding that *Robinson* did not warrant a "revisitation" of the disposition of the issue by the Sixth Circuit in *Parker I*). Furthermore, as other courts have noted, any resulting remedial gap in Title I of the ADA with respect to the provision of fringe benefits is partially filled by ERISA, "which seeks to police . . . fringe benefit abuses." *Hatch,* 485 F. Supp. 2d at 35; *Weyer,* 198 F.3d at 1112.

Accordingly, we conclude that disabled former employees are not "qualified individuals" with a disability under Title I of the ADA.

B.

We acknowledge the plain language of Title I suggests that disabled former employees who still "desire" their former employment positions might, in fact, have standing. *Cf. Hatch*, 485 F. Supp. 2d at 34 n.16 (observing that the word "desires" "may reasonably refer to former employees who still desire to work but, because of their disability, no longer are able to do so"). The instant case, however, does not provide us with an opportunity to examine this nuance. At oral argument, plaintiffs' counsel conceded that he "could not say" that his clients, disabled former employees, would return to work if GM permitted them to do so and provided them with reasonable accommodations. As such, plaintiffs neither "hold" nor "desire" their employment positions, as required for standing under Title I of the ADA. *See Weyer*, 198 F.3d at 1112 ("'[D]esires,' in the present tense, refers to people who presently want jobs, as opposed to those who do not, protecting job applicants against discrimination."). Plaintiffs, then, do not have standing to pursue their ADA claims.

IV.

We further observe that, even if plaintiffs had standing, the benefit plans in question do not violate the ADA. In *Leheny v. City of Pittsburgh*, 183 F.3d 220 (3d Cir. 1999), the benefit plan at issue provided that police officers who were at least 50 years of age and had at least 25 years of service could receive a

retirement benefit equal to 75% of their average monthly pay. *Id.* at 223. Disabled officers who were eligible for this benefit, but who were also receiving worker's compensation, could receive 66 2/3% of pay from worker's compensation and 50% of their pay under the pension plan. *Id.* at 223-34. Significantly, these disabled officers also had the option of rejecting worker's compensation and instead receiving the normal 75% retirement benefit. *Id.* at 230. Accordingly, the court held that the disabled retirees had no ADA discrimination claim:

> Every police officer who has attained 50 years of age and 25 years of service is permitted to receive a 75% pension upon retirement from the force; "every employee is offered the same plan regardless of that employee's contemporary or future disability status." The individual retiree is given the responsibility to decide whether or not to accept worker's compensation in lieu of a 75% pension. Because every eligible retiree is entitled to receive a 75% pension, and because each of the Retirees is permitted to receive a 75% pension when he no longer receives worker's compensation benefits, there is no violation of the ADA.

Id. at 230. In reaching this conclusion, the *Leheny* court relied on *Ford v. Schering-Plough*, 145 F.3d 601 (3d Cir. 1998), in which the Third Circuit examined whether an insurance plan providing different benefits for different types of disabilities violated the

ADA. Concluding that the plan did not violate the ADA, the court noted,

> Every Schering employee had the opportunity to join *the same plan with the same schedule of coverage,* meaning that every Schering employee received equal treatment. So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities.

Id. at 806 (emphasis added). Likewise, in the instant case, each plaintiff had equal access to the same benefit plan; thus, they too received equal treatment from GM. Accordingly, plaintiffs' ADA claims would also fail on the merits.

V.

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEROY MCKNIGHT, *ET AL.*,

Plaintiffs,

v.

GENERAL MOTORS CORP.,

Defendant.

_____/

CIVIL ACTION NO. 05-70666
HONORABLE ARTHUR J. TARNOW UNITED STATES DISTRICT JUDGE

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [D/E # 21]

For the reasons that follow, this Court GRANTS Defendant's Motion for Summary Judgment. Plaintiffs lack standing under the Americans with Disabilities Act ("ADA") to challenge the applicable pension integration provisions based on the plain language of the statute and case law. Even if standing were to exist, Plaintiffs' ADA claims would still be dismissed because Plaintiffs had equal access to General Motors' pension plans. Plaintiffs' Employee Retirement Income Security Act ("ERISA") claim is dismissed because ERISA authorizes the integration of Social Security Disability Insurance Benefits ("SSDIB") with pension benefits. Finally, this court declines to exercise supplemental jurisdiction over Plaintiffs' state law claim. As a result, the case is DISMISSED WITHOUT PREJUDICE as to the state law claim.

INTRODUCTION

From March 17, 1969, until February 1, 2000, Leroy McKnight was an hourly employee of General Motors Corporation ("GM"). On February 1, 2000, he opted for an early retirement package pursuant to a September 28, 1999, Supplemental Agreement Covering Pension Plan ("the Pension Plan") that was entered into by GM and the United Auto Workers. As a result, McKnight began receiving $501.89 in monthly pension benefits and $2,228.11 in monthly supplemental pension payments. In November 2000, he began receiving Social Security Disability Insurance Benefits ("SSDIB") in the amount of $1,592.20 a month on account of a back injury. Pursuant to the Pension Plan, GM reduced his supplemental pension payments by $1,165.50.

McKnight filed a charge with the Equal Employment Opportunity Commission ("EEOC"). After an investigation, the EEOC issued a right to sue letter on November 15, 2004, explaining that it was unable to conclude that GM had violated any statute.

McKnight then filed suit in district court asserting that the Pension Plan does not authorize GM to reduce pension benefits of disabled retirees who become entitled to SSDIB because it violates the ADA, the Michigan Persons With Disabilities Civil Rights Act ("PWDCRA"), and the ERISA. Plaintiff argues that he meets the terms of the Pension Plan by having over thirty (30) years of service, retiring early, and being able to perform the essential

functions of his former job at GM with reasonable accommodations at the time of his retirement.

On October 17, 2005, the complaint was amended to include three additional Plaintiffs who were treated similarly. These Plaintiffs claim that the provisions of the Pension Plan and the GM Retirement Program for Salaried Employees ("the Retirement Program"), which require a portion of one's early retirement supplement become unavailable at the time a retiree becomes or could have become eligible for a SSDIB, violate the ADA, the PWDCRA and the ERISA.

APPLICABLE PLAN PROVISIONS

The Pension Plan provides retirement benefits to eligible participants based on completion of years of credited service. Employees who retire after completing more than 30 years of credited service are eligible to receive an early retirement supplement until the retiree becomes eligible for Social Security benefits. Appendix A, Article II, § 6.

> (a) An employee who retires under Section 2 (other than an employee referred to in Section 4(d) of this Article II, unless the Corporation or Impartial Umpire under an applicable collective bargaining agreement determines the discharge should not result in the employee being ineligible for benefits under this Section 6, or Section 3 of this Article II, and who retires within five years of the last day worked for the Corporation will

receive, in addition to the pension, certain supplements as set forth below:

(1) If the employee retires under Section 2 or Section 3 of this Article II with 30 or more years of credited service at the date of retirement, such employee shall be entitled to a monthly early retirement supplement until age 62 and one month in an amount which when added to the monthly pension under this Plan will equal the amount of total monthly benefit provided in the table set forth below, subject provision of this Section 6.

Ex. A, p. 15.

The Pension Plan provides that a portion of the early retirement supplement, in an amount equal to the temporary benefit, is not payable once an retired employee becomes or could have become eligible for SSDIB either through disability or because they reach the age one becomes eligible for Social Security benefits (62 years and 1 month). Article II, § 6(b) provides:

(b) The early retirement supplement under provision (a)(1) of this Section 6 for an employee who retires at the employee's option shall be calculated assuming that the basic pension commences immediately after retirement, and such early retirement supplement and the interim supplement under provisions of (a)(2) of this Section 6 shall be reduced for any month prior to age 62 and one month, for which the employee becomes or could have become eligible for a Federal Social Security benefit, by an amount equal to the amount of the temporary benefit to which the

employee would have been entitled if retired under Section 2(b) of this Article II.

Ex. A., p. 17.

Plaintiffs challenge this provision that requires a reduction of the early retirement supplement once one becomes eligible for SSDIB.

Two Plaintiffs retired under the Retirement Program. Exhibit B. Their entitlement to the temporary benefits is described in Part A, Article 1, § 4(a)(ii):

> (ii) A temporary benefit for each year of credited service, up to 30 . . . The monthly temporary benefit shall be payable until the earlier of (1) age 62 and one month, or (2) the age at which the employee becomes, or could have become, eligible for a Federal Social Security benefit for disability or an unreduced Federal Social Security benefit for age. At such age the temporary benefit shall cease to be payable.

Ex. B. Entitlement to an early retirement supplement is described at Part A, Article I, § 7. Ex. B.

> (a) An employee who retires with benefits payable under Section 2 of this Article . . . or who retires with benefits payable under Section 4 of this Article, and who retires within five years of the last day worked for the Corporation will receive, in addition to retirement benefits, certain supplements as set forth below:

> (1) If the employee retires under Section 2 or 4 of this Article with 30 or more years of credited service at the date of retirement and such employee's date of hire was prior to January 1, 1998, such employee shall be entitled to a monthly early retirement supplement until age 62 and one month in an amount which when added to the monthly retirement benefit under this Part A and any supplementary benefits under Part B, prior to reduction for survivor coverage, will equal the amount of total monthly benefit provided set for below . . .
>
> (b) The early retirement supplement under subsection (a)(1) of this Section 7 for an employee who retires voluntarily shall be calculated assuming that the basic benefit commences immediately after retirement, and such early retirement supplement under subsection (a)(2) of this Section 7 shall be reduced for any month prior to age 62 and one month for which the employee becomes or could have become eligible for a Federal Social Security benefit, by an amount equal to the amount of the temporary benefit to which the employee would have been entitled if retired under Section 4 of this Article I.

Under both the Pension Plan and the Retirement Program, the early retirement benefits are designed to decrease by the amount received from the government either at the time when either: a) they reach the age to receive Social Security Benefits; or b) they become eligible for SSDIBs prior to age 62 and one month. Both the Pension Plan and the Retirement Program were designed to achieve what is referred to

as "benefit integration" with Social Security benefits. Benefit integration permits a higher level of income to all retired/disabled employees by allowing benefits under such plans to take credit for other income streams that a participant may be entitled to receive.

THE EMPLOYEES' CIRCUMSTANCES

After commencing early retirement, each Plaintiff became disabled prior to the age 62 plus one month. Additionally, each Plaintiff applied for and was later awarded SSDIB because they met the definition of disabled established by the Social Security Administration ("SSA").

After 30 years of credited service, McKnight retired under the Pension Plan on Feb 1, 2000. McKnight later applied for and was awarded SSDIB effective December 2000. GM now claims that it overpaid him $10,489.50.

Nicholas Klayo retired January 1, 1999 under the Retirement Program after 30 years of credited service. After filing for SSDIB in December 2002, Klayo was retroactively awarded SSDIB effective from December 2001. Due to the retroactive award, GM argues that he was overpaid $35,166.96 as a result.

Robert Griffin completed 26 years of credited service under the GM Retirement Program, then transferred to American Axle. In total he completed 30 or more years and retired December 1, 1998. Griffin receives retirement benefits from the Retirement Program for his 26 years as well as retirement

benefits from American Axle. Griffin filed his application for SSDIB on March 22, 1999 and was awarded SSDIB on April 1, 1999 for benefits retroactive from October 12, 1998. As a result, GM believes it overpaid him $30,446.40.

Carol Dudek, worked for GM for 24 years and then transferred to American Axle. On January 1, 1999, assets held in the GM Retirement Program for employees who still worked for GM component facilities were transferred to the retirement plan established by Delphi. As a result, she receives her retirement benefits from Delphi for 24 years and American Axle for 6 years.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT LACK OF STANDING UNDER THE ADA

The ADA prohibits discrimination against a qualified individual with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms conditions and privileges of employment." 42 U.S.C. 12112(a). A qualified individual is defined as someone who has a disability "who with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. 12111(8).

> The regulations governing the ADA specifically provide that it is unlawful for an employer to discriminate on the basis of disability against a qualified individual with a

> disability in regard to 'fringe benefits available by virtue of employment . . . '. 29 C.F.R. § 1630.4(f) (1996). *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (*en banc*).

Plaintiffs were awarded SSDIB after being found to be disabled as defined by the SSA, *i.e.*, an "inability to do any substantial gainful activity because of any medically determinable impairment that can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 20 C.F.R. §§ 404.1505(a), 416.905(a). By qualifying for SSDIB and receiving benefits, none of the Plaintiffs can be considered a "qualified individual with a disability."

In *Parker v. Metro Life Ins. Co.* ("*Parker I*"), a three judge panel of the Sixth Circuit addressed the applicability of the ADA to a corporate disability plan's 24-month limitation of benefits to those affected by mental or nervous disorders. 99 F.3d 181 (6th Cir. 1996), *aff'd*, 121 F.3d 1006 (6th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1084 (1998). The panel upheld the district court's ruling that the former employee/plaintiff lacked standing to raise a Title I ADA claim because she could not perform the essential functions of her job and therefore was not a "qualified individual with a disability" as required by the ADA. *Id.* at 185. The plaintiff in *Parker I* argued that she was invoking he statute in an effort to retain the "employment position" of a "benefit recipient." *Id.* at 186. The panel responded by stating:

> Plaintiff's proposed construction of the statute is not persuasive. The concept of "benefits recipient" as an "employment position" relies on a convoluted construction of the statutory language, which conflicts with the plain meaning of the words. Perhaps the drafters of the statute intended that Ms. Parker's situation to bring her within the coverage of the Disabilities Act. If that is the case, they failed to provide definitions that lend themselves to doing so. Unfortunately, Congress may not have taken this situation into account. Such an oversight, however, is for Congress to remedy. We should not try to rewrite the statute in a way that conflicts with what appears to be fairly clear language. *Id.* at 187.

In an opinion that did not specifically address the issue of standing,[1] an *en banc* panel of the Sixth Circuit determined that even though the ADA prohibited discrimination between disabled and non-disabled, the plan's provisions did not violate the ADA because

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[1] The case was reviewed *en banc* but only with respect to the district court's decision concerning Plaintiff's separate Title III argument. The standing issue was not addressed because "Although Parker discusses her Title I claim in her briefing to the en banc court, Parker did not seek rehearing on the disposition of the Title I claim." *Id* at 1008 fn. 2. The *en banc* decision recounted that the district court dismissed plaintiff's Title I claim due to lack of standing. "Because Parker was not a qualified individual under Title I, a suit against her employer could not be maintained under the ADA." 121 F.3d at 1008.

the employees received the "same access" to benefit plans.

> The disparity in benefits provided in the policy at issue is also not prohibited by the ADA because the ADA does not mandate equality between individuals with different disabilities. Rather, the ADA prohibits discrimination between the disabled and the non-disabled; specifically, the ADA mandates that the owners, lessors, and operators of public accommodations provide equal access to the disabled and non-disabled. Because all employees at Schering-Plough, whether disabled or not, received the same access to the long-term disability plan, neither the defendants nor the plan discriminated between the disabled and the able bodied. *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1015-16 (6th Cir. 1997) (*en banc*) ("*Parker II*").

Applying the rationale of *Parker I,* Plaintiffs lack standing to raise an ADA claim because they are not qualified individuals, *i.e.,* they cannot perform the essential functions of their employment positions with or without reasonable accommodations at the time of the alleged discrimination.

Plaintiffs argue that the *Parker I* decision is not binding precedent since the opinion was vacated and the case was decided on separate grounds by the *en banc* panel. Plaintiffs contend that a former employee's standing to sue for benefits discrimination under Title I should be measured at the time of retirement when a plaintiff was "otherwise able to

perform the essential functions of their former jobs with Defendant, with reasonable accommodation," not at the time of suit as the *Parker I* court determined. This measure was adopted by the Second Circuit Court of Appeals' opinion *Castellano v. City of New York,* where the court ruled that disabled plaintiff-retirees had standing under the ADA to file suit if they were able to perform the essential functions of their jobs with or without accommodation up to the time they became eligible for the benefits in question. 142 F.3d 58, 69 (2nd Cir. 1998). In arriving at this conclusion, the court determined that the legislative history of the phrase "qualified individual with a disability" was not conclusive in defining the time of an employment action. *Id.* at 67. To determine the correct measure, the court then looked to the essential function of the ADA, to stop disability discrimination whenever it happens. *Id.* at 67-68. Since this broad interpretation was proper, the court found that a retiree who works long enough to establish entitlement to an employer-related fringe benefit is a "qualified individual with a disability" within Title I of the ADA. *Id.*

Despite Plaintiffs' argument to the contrary, *Parker II* did not disturb the original panel's disposition of the Title I issues in *Parker I.* According to a footnote in the *en banc* opinion, *Parker I's* Title I standing ruling was not raised as an issue when Plaintiff sought rehearing. 121 F.3d at 1009, fn. 2. Thus, the *en banc* court neither adopted nor rejected *Parker I*'s rationale on this issue. Although the *Parker*

I opinion may have been technically vacated through an order to hear the case *en banc,* the opinion is still cited and the reasoning is still relied upon by other circuits. *See Weyer v. Twentieth Century Fox Film Corp.,* 198 F.3d 1104 (9th Cir. 2000); *see also EEOC v. CNA Ins. Cos.,* 96 F.3d 1039 (7th Cir. 1996); *Gonzales v. Garner Food Services, Inc.,* 89 F.3d 1523 (11th Cir. 1996); *Beauford v. Father Flanagan's Boys' Home,* 831 F.2d 768 (8th Cir. 1987); *Smith v. Midland Brake, Inc.,* 180 F.3d 1154 (10th Cir. 1999). In terms of legal landscape surrounding this issue, only the Second Circuit, Third Circuit and certain First Circuit district courts follow this "at the time of retirement" rule announced in *Castallano. See Castallano,* 142 F.3d 58 (2nd Cir. 1998); *Ford v. Schering-Plough Corp.,* 145 F.3d 601 (3rd Cir. 1998); *see also Fletcher v. Tufts,* 367 F.Supp.2d 99 (D. Mass. 2005).

In a case with a similar factual scenario as this case, the Ninth Circuit joined the majority of Circuit Courts by rejecting a similar claim by holding that Plaintiff was not a qualified individual and thus was not protected by the ADA. *Weyer v. 20th Century Fox Film Corp, supra.* In *Weyer,* the plaintiff, who was totally disabled and collecting SSDIB, sought to challenge discrimination in fringe benefits applicable to a period of time following termination of her employment. Following the rationale of *Parker I,* the Ninth Circuit held that the plaintiff lacked standing to pursue an action under the ADA.

> We join the five circuits that have held that only persons who can perform the essential

functions of a job can sue under Title I, rather than the two circuits that have held to the contrary, for compelling reasons. First, the statute says so, quite plainly. Second, most circuits have said it says so. Third, there is a sensisble purpose Congress may well have had in saying so, which gives us confidence that we understand the words. Fourth, other legislative, such as ERISA, addresses fringe benefits for people unable to perform the functions of a job even with reasonable accommodations. Finally other sections of the Act suggest that this distinction is intentional. For example, Title III of the Act regarding public accommodations applies not to "qualified individuals," but simply to any individual.

We agree with the Sixth, Seventh, Tenth and Eleventh Circuits that someone who is totally disabled cannot sue under Title I's unambiguous provisions. Weyer is not a "qualified individual" because she cannot now perform the essential functions of the employment position as a result of her total disability, and because she was not disabled at the time of the alleged discriminatory conduct. The term "qualified" limits the protection of Title I of the Act.

Title I also unambiguously excludes former employees. A "qualified individual" is one who "can performs the essential functions of the employment position that such individual *holds or desires*." "Holds," in the present tense, refers to current employees. Likewise,

> "desires," in the present tense, refers to people who presently want jobs, as opposed to those who do not, protecting job applicants against discrimination. This is language well designed to help people get and keep jobs, not help those no longer able to work get disability pay, Congress has the authority to improve the circumstances of disabled people in some respects even if it does not improve them in all respects. A statute may provide a partial remedy for what Congress perceives as a social problem because the proponents are compelled to compromise with others who think a broader statute would be a worse social problem.

Id. at 1112.

Even if the ruling of *Parker I* is not controlling precedent, at the very least, the opinion is instructive as to how the Sixth Circuit would rule if again presented with this issue. Additionally, a majority of circuits and district courts have found that standing does not exist, including a colleague from this district court who similarly relied on the reasoning of *Parker I*. *Fobar v. City of Dearborn,* 994 F.Supp. 878, 882-884 (E.D. Mich. 1998) (J., Rosen). The plain language requires that to have standing the person "can perform" the essential functions of the employment position that the individual "holds or desires." The retirees cannot perform the essential functions of the jobs since they are disabled as defined by the SSA. Additionally, the retirees neither hold nor desire their former positions since they elected to take early

retirement. Based on the majority of case law, the Sixth Circuit's ruling on this issue in *Parker I,* and the plain language of the statute, this court finds that Plaintiffs lack standing to sue under the ADA because they do not fit within the Act's definition of a qualified individual with a disability.

Equal Access

Even if Plaintiffs had standing to sue under the ADA, this court finds there would be no ADA violation based on the reasoning of *Leheny v. City of Pittsburgh,* 183 F.3d 220 (3rd Cir. 1999). In *Leheny,* disabled police officers brought an action against the City of Pittsburgh contending, in part, that the offset of their pension benefits by worker's compensation violated provisions of the ADA. *Id.* at 224-25. Under the collective bargaining agreement as modified by an arbitration award which included a pension plan provision, officers who were at least 50 years old and had at least 25 years experience could receive an enhanced retirement benefit equal to 75% of their average monthly pay. *Id.* at 223. For disabled officers receiving worker's compensation, the award provided that the officer could receive up to 66 2/3% of their pay from worker's compensation and receive 50% of their average monthly pay. *Id.* The award further provided that if worker's compensation benefits were reduced or eliminated after retirement, the pension could be increased back to 75% of their average monthly pay. *Id.* at 224.

The Third Circuit ruled that these provisions were not violative of the ADA because every employee had access to the same benefit plan. "Every police officer who has attained the age of 50 years of age and 25 years of service is permitted to receive a 75% pension upon retirement from the force; 'every employee is offered the same plan regardless of that employees contemporary or future disability status.'" *Id.* at 230.

> The Retirees are not prevented from receiving a 75% pension if they so desire. The arbitration award clearly states that every police officer [sic] who has attained 50 years of age and 25 years of service is entitled to receive a 75% pension upon retirement from the police officer [sic]. Disabled officers are not required by the arbitration award to accept the 50% pension and 66 2/3% worker's compensation. There is nothing in the circumstances that prevents a retired police officer from rejecting worker's compensation payments and thereby receiving the 75% pension.

Id.

Similar to the *Leheny* case where the retirees sought benefits of over 100% of their former salary, Plaintiffs seek to combine full SSDIB on top of their full GM pension benefits. Plaintiffs not only receive an amount equal to what they would receive if they only were given GM's temporary retirement supplement, they receive more than if they had just retired. Plaintiffs voluntarily elected to retire under the GM

plans after 30 years of service. At the time, each had documentation that indicated how SSDIB award before the age of 62 plus one month would cause a cessation or reduction in benefits in the amount of the temporary benefit. Everyone, both the able, the disabled, and the future disabled had equal access to the benefits programs. Plaintiffs chose to apply for and later received SSDIB, which resulted in a reduction of their temporary entitlements. Thus, even if Plaintiffs had standing, there is no violation of the ADA.

ERISA Claim

In *Allessi v. Raybestos-Manhattan, Inc.*, the Supreme Court considered whether ERISA's nonforfeitability provisions would prohibit the integration of pension benefits with other income. 451 U.S. 504 (1981) The Court explained that the establishment of pension plans and the level of benefits they provide are left to the discretion of the employer:

> ERISA leaves this question largely to the private parties creating the plan. That the private parties, not the Government, control the level of benefits is clear from statutory language defining nonforfeitable rights as well as from other portions of ERISA.

Id. at 511. The term nonforfeitable was defined "a claim to the benefit and not the benefit itself, that must be 'unconditional' and 'legally enforceable against the plan.'" *Id.* at 512, quoting *Nachman v.*

Pension Benefit Guaranty Group, 446 U.S. 359, 371 (1980).

The Court's attention then turned to the plan's integration of pension benefits with other income streams, in particular Social Security benefits. It was determined that this process leads to a higher level of benefits for all participants. *Id* at 515. In analyzing whether the practice was permitted, the Court looked to Congress and determined that they did not prohibit this type of integration and "expressly preserved the option of pension fund integration with benefits available under both the Social Security Act . . . and the Railroad Retirement Act." *Id* at 514-515.

The Court also discussed plan integration with workers compensation, a variant of what occurred in this case.

> [R]etirees conclude that integration with pension funds with workers' compensation awards lacks the rationale behind integration with pension funds with Social Security and Railroad Retirement . . . [However] [b]oth the Social Security and Railroad Retirement Acts provide payments for disability as well as for wages lost due to retirement, and ERISA permits pension integration without distinguishing these different kinds of benefits.

Id. at 518-519.

The *Allessi* opinion demonstrates that the Supreme Court has long recognized the value of integrating pension benefits with other income, including

SSDIB since it specifically held that such integration is allowed under ERISA. Even though not addressed by the Supreme Court decision in *Allessi* since it was prior to the passage of the ADA, every court that has since considered the question of the lawfulness of whether pension integration under the ADA has found it to be lawful. *See Bonovich v. Knights of Columbus,* 146 F.3d 57, 60 (2nd Cir. 1998); *Huppeler v. Oscar Mayer Foods Corp.,* 32 F.3d 245 (7th Cir. 1994); *Hammond v. Xerox Corp. Retirement Income Guarantee Plan,* 1999 WL 33915859 (C.D. Cal. 1999); *DiCioccio v. Duquesne Light Co.,* 911 F.Supp. 880 (W.D. Penn. 1995).

This court agrees that integration of social security benefits and pension benefits have long been recognized as a valid practice by the Internal Revenue Service, Congress and the courts. Thus, Plaintiffs' claim that the pension integration provisions violate the ERISA is dismissed because it has no merit.

Supplemental Jurisdiction

Under 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction if all claims over which it has original jurisdiction have been dismissed. Because Plaintiffs' ADA and ERISA claims have been dismissed, Plaintiffs have no basis for federal jurisdiction. Therefore, the court lacks subject matter jurisdiction, and will decline to exercise its

supplemental jurisdiction over Plaintiffs' state law claims.

CONCLUSION

For the reasons stated above,

IT IS ORDERED that Defendant's Motion for Summary Judgment is **GRANTED** and as a result the case is **DISMISSED WITHOUT PREJUDICE** to the state law claims.

/s/ Arthur J. Tarnow
Arthur J. Tarnow
United States District Judge

Dated: March 20, 2007

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 20, 2007, by electronic and/or ordinary mail.

/s/ Theresa E. Taylor
Case Manager

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 11211(4) provides:

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

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42 U.S.C. § 11211(8) provides:

The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

As of January 1, 2009, 42 U.S.C. § 12112(a) provides:

General rule. – No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Prior to January 1, 2009, 42 U.S.C. § 12112(a) provided:

General rule. – No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment.

---

42 U.S.C. § 12112(b) provides[1]:

(b) Construction As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor

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[1] Prior to January 1, 2009, this section began, "As used in subsection(a), the term 'discriminate' includes – ."

union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

---

42 U.S.C. § 12112(d) provides:

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if –

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that –

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

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42 U.S.C. § 12113(a) provides:

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

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42 U.S.C. § 12117(a) provides:

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

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29 C.F.R. § 1630.07 provides:

Standards, criteria, or methods of administration.

It is unlawful for a covered entity to use standards, criteria, or methods of administration, which are not

job-related and consistent with business necessity, and:

(a) That have the effect of discriminating on the basis of disability; or

(b) That perpetuate the discrimination of others who are subject to common administrative control.

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29 C.F.R. § 1630.10 provides:

Qualification standards, tests, and other selection criteria.

It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

Supreme Court, U.S.
FILED
MAY 29 2009
OFFICE OF THE CLERK

No. 08-1113

In the Supreme Court of the United States

LEROY MCKNIGHT, ET AL.,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Title I ("Employment") of the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12112(a) (2008), bars "discriminat[ion] against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

The ADA defines "qualified individual" to "mean[] an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. 12111(8).

The Questions Presented are:

(1) Whether retirees who become totally disabled and receive Social Security Disability Insurance ("SSDI") benefits are "qualified individual[s]" entitled to seek relief under § 12112(a) when they have no current interest in holding an employment position, but rather complain about the calculation of their retirement benefits.

(2) Whether it violates § 12112(a) for a retirement plan to provide that former employees' supplemental early retirement benefits will be reduced if they receive SSDI benefits.

RULE 29.6 DISCLOSURE STATEMENT

Respondent General Motors Corporation states that it is a publicly-traded corporation incorporated under the laws of Delaware. Respondent has no parent corporation and no publicly-traded corporation owns ten percent or more of its stock.

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Respondent General Motors Corporation respectfully submits this Brief in Opposition.

STATEMENT

A. Statutory background.

The Americans with Disabilities Act's basic prohibition against discrimination in employment is codified at 42 U.S.C. 12112(a). As applicable to this case (it has since been amended in immaterial respects, *see* Pet. App. 46a-47a), it provides:

> (a) General rule. -- No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

The term of art "qualified individual" thus is incorporated into § 12112(a) and defines the class of individuals protected by the Act's basic prohibition against employment discrimination. That term is defined by 42 U.S.C. 12111(8):

> The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. * * *

Subsection (b) of § 12112, entitled "Construction," provides that the word "discriminate" in subsection (a) "includes" various employment practices set out in seven paragraphs. The paragraph relied upon by petitioners is § 12112(b)(2), which states that subsection (a) covers:

> participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs)

Although Title I's basic prohibition against discrimination protects only "qualified individual[s]," the ADA's anti-retaliation provision, 42 U.S.C. 12203, is not so limited. Subsection 12203(a) provides:

> (a) Retaliation. -- No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

The Petition Appendix contains many of the relevant provisions of the ADA. It omits, however, § 12203, the anti-retaliation provision, and § 12201(c), the safe harbor provision for bona fide benefit plans (*see infra* at 20-21 n.9). For the Court's convenience, respondent reproduces the most significant provisions of the ADA, including §§ 12203 and 12201(c), in the Appendix hereto ("App.").

B. Statement of the Case.

1. Petitioners are three retired former employees of respondent who now receive Social Security Disability Insurance ("SSDI") benefits based on a determination that they are totally disabled. Petitioners took early retirement under plans applicable to salaried and hourly workers with 30 years of service.[1] Under the plans, petitioners were eligible for supplemental early retirement benefits until age 62 and one month. Then, as now, respondent's early retirement plans provided for "benefit integration" between the supplemental early retirement benefits and Social Security benefits. When Social Security Old Age benefits become available, the supplemental early retirement benefits expire (while the basic pension benefits continue). Pet. App. 30a-31a. And the supplemental early retirement benefits are likewise reduced if a retiree becomes eligible for SSDI benefits before reaching the age of 62 and one month. As the court below explained, "[b]enefit integration permits a

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[1] Respondent's plans for salaried workers and hourly workers are separate, but the plans are identical in all respects relevant here. Pet. App. 3a, 5a.

higher level of income to all retired/disabled employees by allowing benefits under such plans to take credit for other income streams that a participant many be entitled to receive." Pet. App. 5a (internal quotations omitted). Early retirees are also required to refund any overpayments of supplemental early retirement benefits if SSDI benefits are awarded retroactively. Pet. App. 6a.

After retiring and beginning to receive early retirement benefits under respondent's plans, petitioners sought and were awarded SSDI benefits. Accordingly, petitioners' supplemental early retirement benefits were reduced under the plans' "benefit integration" provisions. The reduction is smaller than the amount of SSDI benefits, so petitioners receive more in total benefits than if they had not sought and received SSDI benefits. *See* Pet. 5-6 & n.5. In accordance with the plans, respondent also sought repayment of supplemental early retirement benefits as a result of retroactive SSDI benefits received by petitioners.

2. Petitioners filed this suit contending that the benefit-integration provisions in respondent's plans discriminate on the basis of disability in violation of § 12112(a) because supplemental early retirement benefits are reduced on account of SSDI benefits but not on account of income received from other sources after retirement. For example, a retiree who later works (with or without reasonable accommodation of a disability) for another employer, or who returns to respondent as a contract employee, continues to receive the full amount of supplemental early retirement benefits (until age 62 and one month). Petitioners also alleged that the benefit-

integration provisions violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001 *et seq.*, and a Michigan statute.

With respect to petitioners' ADA claim, no petitioner alleges that respondent forced him to take early retirement because of disability discrimination. Nor does any petitioner allege that respondent discriminated against him because of disability during his employment. Indeed, petitioners do not allege that they had a disability during their employment. And at the time that petitioners' supplemental early retirement benefits were reduced and this suit was filed, no petitioner "h[e]ld[] or desire[d]" a job with respondent (or elsewhere, for that matter), consistent with the findings that petitioners were totally disabled and entitled to SSDI benefits. *See* 42 U.S.C. 423(d)(1)(A) (SSDI eligibility requires "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months").[2]

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[2] In their amended complaint, two petitioners alleged that they "could continue to work with reasonable accommodation," Am. Compl. ¶¶ 19, 29, despite their receipt of SSDI benefits, but did not allege that they "desire[d]" an "employment position" with respondent. One petitioner conceded that he was "totally disabled." *Id.* ¶ 13. The former two petitioners abandoned their reasonable accommodation contention in the court below, *see* Pet. App. 22a, and the petition does not suggest that any petitioner could or would return to work at respondent or elsewhere, even with accommodation. Given that petitioners have satisfied the standard for SSDI benefits, it is not

Respondent moved for summary judgment on the ground that petitioners, as retirees who neither held nor desired a job and who could not work even with reasonable accommodation, were not "qualified individual[s]" protected by § 12112(a). Respondent also sought summary judgment on the ground that its plans did not "discriminate . . . on the basis of disability," *id.*, even if the omitted words -- "against a qualified individual" -- were not fatal to petitioners' claims.

3. The district court agreed with respondent on both issues. It held, first, that petitioners' claims failed because they were not "qualified individual[s]" covered by § 12112(a). Petitioners argued that they were "qualified individual[s]" because they were "qualified individual[s]" at the time they retired. Pet. App. 35a. The court disagreed, explaining that the "plain language" of § 12111(8) requires measuring a plaintiff's claim to be a "qualified individual" in the present. Pet. App. 39a (§ 12111(8) requires that plaintiff "'can perform' the essential functions of the employment position that the individual 'holds or desires'").

In the alternative, the district court held that petitioners' claims failed on the merits because all of

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surprising that the case thus comes to this Court with petitioners concededly totally disabled. *Cf. Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999). Indeed, there is a degree of "protection integration," to mirror the plans' benefit integration, in that the ADA protects those interested and able to work and SSDI provides benefits to individuals suffering total disabilities that preclude them from working. *See id.* at 801 ("The Social Security Act and the ADA both help individuals with disabilities, but in different ways.").

respondent's employees had "equal access" to its plans. Pet. App. 42a. When petitioners elected early retirement, they knew that their supplemental early retirement benefits would be reduced if they later became eligible for SSDI. All employees were offered the same benefits integration terms, without regard to whether they were disabled. That only some early retirees would become "the future disabled" did not mean that the plans discriminated on the basis of disability. *See id.*[3]

4. The Sixth Circuit affirmed on both grounds. That court had held in *Parker v. Metropolitan Life Ins. Co.*, 99 F.3d 181, 183 (6th Cir. 1996), that § 12112(a) does not apply to former employees who are not "qualified individual[s]." Petitioners urged the court below to reconsider *Parker* in light of this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), which held that the word "employees" as used in Title VII's anti-retaliation provision, 42 U.S.C. 2000e-3(a), extended to former employees.[4] *Robinson* did not address

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[3] The district court also dismissed petitioners' ERISA claims. The court noted that Congress and this Court had approved benefits integration under ERISA, *see Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), and that every court to consider the question even after the enactment of the ADA has held that benefits integration is permitted by ERISA. Pet. App. 42a-44a. The court then declined to exercise supplemental jurisdiction over petitioners' state-law claims. Pet. App. 44a-45a. Petitioners did not appeal the dismissal of their ERISA and state-law claims. Pet. App. 7a.

[4] Even apart from the intervening *Robinson* decision, the precedential status of the *Parker* panel opinion was open to debate. *Parker* was vacated by the Sixth Circuit upon rehearing *en banc*, but rehearing was not sought as to the

§ 12111(8)'s "qualified individual" definition or the ADA at all, but the Second and Third Circuits held in the wake of *Robinson* that former employees are covered by § 12111(8). *See Ford v. Schering-Plough Corp.*, 145 F.3d 601, 607 (3d Cir. 1998); *Castellano v. City of New York*, 142 F.3d 58, 69 (2d Cir. 1998); *but cf. Ford*, 145 F.3d at 615 (Alito, J., concurring in judgment) (declining to reach this issue).

The court below held that *Robinson* did not alter its analysis in *Parker*. *Robinson* emphasized the lack of a "temporal qualifier" in the provision at issue, which created ambiguity concerning its application to former employees. 519 U.S. at 341-42. Section 12111(8), in contrast, contains clear "temporal qualifiers" -- the requirement that the plaintiff "can perform" the essential duties of an employment position that he or she "holds or desires," all expressed in the present tense. *See* Pet. App. 17a-20a. Because the Second and Third Circuits disregarded these express "temporal qualifiers," their finding of ambiguity in § 12111(8) "is tenuous at best." Pet. App. 20a. The Sixth Circuit thus joined the Seventh and Ninth Circuits in holding, after *Robinson*, that former employees who neither "hold[]" nor "desire[]" an "employment position," and who "can[not] perform" the essential functions of their former or any other job because they are totally disabled, fall outside the scope of

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"qualified individual" issue, and the *en banc* court did not consider that issue. *See Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1009 (6th Cir. 1997) (*en banc*); Pet. App. 12a-13a. In all events, the decision below now embodies the Sixth Circuit's precedent on the issue.

§§ 12111(8) and 12112(a). *See Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 457-58 (7th Cir. 2001); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113 (9th Cir. 2000).[5]

The court of appeals also held that respondent's plans do not violate § 12112(a). The plans were available to all employees regardless of "contemporary or future disability status." Pet. App. 24a (quoting *Ford*, 145 F.3d at 806). Respondent thus provided "equal access to the same benefit plan" to petitioners and all others with the requisite years of service, and did not discriminate against petitioners on the basis of disability in offering the plans to them. *Id.*

REASONS FOR DENYING THE WRIT

The circuit split touted by the petition is of negligible practical consequence and does not merit this Court's review. The question on which courts have disagreed -- whether a totally disabled former employee is a "qualified individual" entitled to bring an ADA claim under §§ 12111(8) and 12112(a) -- is academic, because even those courts that have answered that question in the affirmative have proceeded to reject claims like those at issue here. In 1998, then-Judge Alito explained that the "ease" with which similar claims could be rejected on other grounds made it unnecessary to consider the

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[5] The courts below on occasion couched their rulings in the language of "standing." *See, e.g.*, Pet. App. 2a. Despite this imprecise usage, it is clear that the courts did not intend to question whether petitioners had a basis under Article III to bring their claims. *See* Pet. 6 n.9.

principal question on which certiorari is sought here. *Ford*, 145 F.3d at 615 (Alito, J., concurring in judgment). Events since that time have confirmed the correctness of that observation. As in *Ford* itself, the question that Judge Alito declined to reach has made no difference to the outcome in other ADA cases brought by former employees challenging benefits received post-employment. There is no need for this Court to settle a dispute over what amounts to dictum or over whether petitioners' claims should be rejected in one versus two steps.

This case exemplifies how the first question in the petition lacks practical significance. Both courts below held that petitioners' claims failed regardless of whether petitioners are "qualified individual[s]," because respondent's plans did not discriminate on the basis of disability. That holding is correct, and -- despite including it as a second question presented -- the petition makes no serious attempt to argue that it independently merits this Court's review. Accordingly, even if the Court otherwise might be inclined to consider question one, this case is not an appropriate vehicle because whether petitioners are "qualified individuals" makes no difference to the outcome.

Moreover, the Sixth Circuit's resolution of the first question presented is correct. Section 12111(8) contains precisely the "temporal qualifiers" whose absence was critical to this Court's decision in *Robinson, supra*. By limiting the term "qualified individual" to a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires," Congress made it

crystal clear that retirees who neither hold nor desire any employment position and who are totally disabled are not covered. Nor is there any basis for concern that adhering to the plain language of §§ 12111(8) and 12112(a) will risk inadequate protection against retaliation. Unlike in *Robinson*, where the potentially underinclusive term "employees" was used in Title VII's anti-retaliation provision, the ADA's anti-retaliation provision is not linked to the "qualified individual" definition at issue here. The ADA's anti-retaliation provision deliberately reaches far more broadly, protecting "any individual" rather than only "qualified individual[s]" as defined in § 12111(8).

I. CERTIORARI IS NOT WARRANTED BECAUSE THE APPARENT CIRCUIT SPLIT LACKS PRACTICAL CONSEQUENCE.

A. The Apparent Circuit Split is Academic.

Although the lower courts have disagreed on the preliminary question whether totally disabled former employees who neither hold nor desire any employment position are "qualified individual[s]" entitled to bring suit under § 12112(a), the most salient characteristic of that disagreement is its lack of practical relevance to the outcome in cases challenging post-employment benefits. That question therefore does not merit this Court's review. The circuit courts that have addressed the first question presented by the petition have generally done so in two types of cases: (1) when a former employee challenges a disparity in benefits under a long-term disability plan, *e.g.*, a disparity

between coverage for mental and physical disabilities, *see, e.g., Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); or (2) when a retiree alleges that a pension plan provides reduced benefits on account of disability, *see, e.g., Morgan v. Joint Admin. Bd.*, 268 F.3d 456 (7th Cir. 2001); *Castellano v. City of New York*, 142 F.3d 58 (2d Cir. 1998). Both types of claims have been consistently rejected regardless of the resolution of the principal question on which certiorari is sought.

1. In *Ford*, the plaintiff challenged her former employer's long-term disability benefits plan because it limited benefits for mental disability to two years but did not similarly limit benefits for physical disability. 145 F.3d at 603. The case thus presented the "purely legal question of whether a disparity between disability benefits for mental and physical disabilities violates the [ADA]." *Id.* The majority's negative answer to that question ended the case, but the majority nonetheless volunteered its analysis of the "preliminary issue [of] whether Ford is even eligible to sue under the ADA." *Id.* at 604. Then-Judge Alito did not join that analysis and concurred only in the judgment. Judge Alito observed that "[i]n light of the ease with which Ford's claims can be resolved" on other grounds, there was no need to reach the question "whether a former employee who can no longer work can meet Title I's 'qualified individual with a disability' requirement." *Id.* at 615. The first question on which certiorari is sought was likewise irrelevant to the outcome in *Weyer*. After determining that as a former employee the

plaintiff was *not* covered by Title I, the Ninth Circuit went on to hold that the disparity between mental and physical disability benefits in the former employer's plan did not violate Title I in any event. *Weyer*, 198 F.3d at 1116-17.[6]

2. Former employees who, like petitioners, have alleged post-employment discrimination in pension or retirement benefits have also lost on the merits, regardless of whether they have been treated as "qualified individual[s]" entitled to bring such a claim. In *Castellano v. City of New York*, 142 F.3d 58 (2d Cir. 1998), former police officers and firefighters who retired with disability pensions argued that the ADA entitled them to the additional benefits that New York City gave to officers who retired after 20 years of service with "for service" rather than disability pensions. Some plaintiffs had served less than 20 years and thus were eligible only for disability pensions. Other plaintiffs had served for 20 years, but chose disability pensions rather than "for service" pensions. *See id.* at 64-65. The court considered at great length whether the plaintiffs (who, unlike petitioners, were disabled at the time of separation) could be deemed "qualified individual[s]" entitled to sue under § 12112(a),

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[6] The only exception to the courts of appeals' unanimous rejection of such mental-physical disability benefits disparity claims was a decision by a divided panel of the Eleventh Circuit that was vacated upon grant of rehearing en banc. *See Johnson v. K Mart Corp.*, 273 F.3d 1035 (11th Cir. 2001); *id.* at 1070 (vacatur order). The panel decision remains vacated, and rehearing remains stayed, pending the outcome of the defendant's bankruptcy. *See Johnson v. K Mart Corp.*, 281 F.3d 1368 (11th Cir. 2002) (*en banc*).

ultimately answering that question in the affirmative. *See id.* at 66-69. But the court then made short work of the claims on the merits, holding that the City did not discriminate based on disability in reserving "for service" pensions to officers who served the requisite 20 years or in declining to permit 20-year veterans who freely chose disability pensions to receive "for service" pensions as well. *Id.* at 70-71. Just as the Sixth Circuit concluded in the present case, the latter retirees had equal access to the benefits they complained had been denied them, and nothing in the ADA required the City to give disabled retirees more benefits than similarly-situated non-disabled retirees. *Id.* As to the vast majority of plaintiffs in *Castellano*, the court's "qualified individual" discussion was thus unnecessary.

One plaintiff (Velardi) made a different allegation. Velardi alleged that he served 20 years and should have been free to choose either a "for service" or a disability pension, but that, because of his disability, the City "forced" him to retire with a disability pension. *Id.* at 72. The Second Circuit held that this allegation stated a valid claim of disability discrimination. *Id.* Although the court appeared to believe that its conclusion that former employees can be "qualified individual[s]" despite not "desir[ing]" a job was necessary to uphold Velardi's claim, *see id.*, it was not. Velardi's claim was that the City had discriminated against him while he was still an employee, in forcing him to retire with a disability pension instead of giving him the choice between a disability pension and a for-service pension. Velardi "h[e]ld[]" a job and thus

plainly was covered by Title I at the time of the alleged discrimination. Just as a covered employee who alleges that he was fired in violation of the ADA can sue under § 12112(a) despite being a "former" employee at the time the suit is brought, Velardi could sue for discrimination in the "terms, conditions, and privileges of [his] employment," *id.*, that occurred while he was an employee. The *Castellano* court therefore did not need to consider whether § 12111(8)'s "qualified individual" definition can be extended to cover a former employee who alleges discrimination occurring after his employment has ended and at a time when he no longer "desires" a job (or "can perform the essential functions" of a job) with his former employer. And, in all events, an individual like Velardi who is disabled while still an employee poses a different question from individuals like petitioners who become disabled only after ending the employment relationship.

For these reasons, despite some methodological disagreement as to whether there are one or two (or more) fatal defects in claims brought by retirees, there is no circuit split over whether retirees have a valid claim under the ADA. Claims of post-employment discrimination affecting former employees who are no longer "qualified individual[s]" at the time of the alleged discrimination have been uniformly rejected. Although some judges have chosen to address the subsidiary issue of whether such plaintiffs can sue under § 12112(a) before holding that such claims in any event fail to state a violation of that provision, any disagreement on that subsidiary issue is an academic exercise. Review of

this issue can await the day, if it ever comes, on which a court of appeals finds retirees to be "qualified individual[s]" *and* awards them some relief. Then-Judge Alito was correct that there was no need for the Third Circuit to reach the "qualified individual" issue in *Ford*, and there is even less reason for this Court to devote its scarce resources to it in the absence of a conflict that matters to the outcome of actual cases.

B. This Case Is Not An Appropriate Vehicle to Resolve the Apparent Split.

This case exemplifies why the disagreement concerning whether retirees who are totally disabled and do not "desire[]" a job are "qualified individual[s]" does not merit this Court's intervention. As in the cases discussed above, petitioners failed to allege a valid § 12112(a) claim, even aside from petitioners' failure to come within the "qualified individual[s]" entitled to bring suit. Even if the Court might be inclined to consider the first question presented in a case where the question was outcome-determinative, this is not such a case. Petitioners make a half-hearted effort to seek this Court's review on the Sixth Circuit's second basis for dismissing their claims, but there plainly is no need for this Court to consider that question.

1. The Sixth Circuit concluded that because petitioners had equal access to respondent's plans, there was no violation of § 12112(a). Pet. App. 24a. That conclusion is correct, as well as fully consistent with other circuits' treatment of similar claims.

The Sixth Circuit reasoned that because petitioners and all other employees had the same

opportunity to elect early retirement under the same plans with the same terms, respondent did not discriminate on the basis of disability in offering the plans. Pet. App. 24a. Unlike in *Castellano*, respondent did not "force" any petitioner to enroll in a less-advantageous plan than other employees were offered; indeed, respondent offered only a single, unitary plan for salaried employees and a single, unitary plan for hourly employees. As in *Leheny v. City of Pittsburgh*, 183 F.3d 220, 230 (3d Cir. 1998), and *Ford, supra*, all employees "had the opportunity to join the same plan with the same schedule of coverage, meaning that every [GM] employee received equal treatment." Pet. App. 24a (quoting *Ford*, 145 F.3d at 806). Petitioners do not allege that they were disabled at the time they elected to take early retirement, let alone that respondent somehow discriminated against them on the basis of disability by offering them less favorable terms than non-disabled employees received.

To the contrary, all of respondent's employees who were eligible for early retirement had the opportunity to elect early retirement under the same terms, without regard to whether they were then disabled or would in the future become disabled. All of respondent's employees who elected early retirement knew that, if they were to become totally disabled and receive SSDI benefits before attaining age 62 and one month, their supplemental early retirement benefits would be reduced. *See* Pet. App. 24a ("So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred . . .") (quoting *Ford*, 145 F.3d at 806); *see*

also Leheny, 183 F.3d at 230 (holding that equal entitlement under the pension plan, even if reduced in proportion to worker's compensation benefits during the time retiree receives benefits, does not violate ADA). This Court made a similar point in the context of the Age Discrimination in Employment Act in *Kentucky Retirement Sys. v. EEOC*, 128 S. Ct. 2361, 2367 (2008) ("the specific benefit at issue here is offered to all hazardous position workers on the same nondiscriminatory terms ex ante").

In addition to the Third Circuit authority on which the court below expressly relied, the decision below is fully consistent with decisions of the Second, Seventh, and Ninth Circuits. In *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144 (2d Cir. 2000), the court held that it did not violate the ADA for the employer to offer different long-term benefits for mental and physical disabilities. As in the present case, the court emphasized that, whatever the levels or details of coverage in the plan, the plaintiffs "were given access to the same fringe benefit plan as their coworkers and, in, that sense, enjoyed equal 'compensation, . . . terms, conditions, and privileges of employment.'" *Id.* at 149 (ellipsis in original). "Viewed through this lens," the court explained, "they were not discriminated against at all." *Id.*[7]

In *EEOC v. CNS Ins. Cos.*, 96 F.3d 1039 (7th Cir. 1996) (D. Wood, J.), the court similarly made

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[7] The Second Circuit noted that given its holding that the employer had not discriminated based on disability in violation of § 12112(a), it did not need to consider whether the plaintiffs were "qualified individual[s]." *Id.* at 147 n.3.

clear that the key inquiry is whether the employer discriminated based on disability in providing access to its plan or plans. The court recognized that a pension plan may be a term or condition of employment covered by § 12112(a), but it emphasized that

> there is no claim here that CNA discriminated on the basis of disability in offering its pension plan to anyone. It did not charge higher prices to disabled people, on the theory that they might require more in benefits. Nor did it vary the terms of its plan depending on whether or not the employee was disabled.

Id. at 1044. The court explained that the plaintiff's claim in reality was that the plan discriminated against "employees who *in the future* will become disabled due to mental conditions," because those employees' "present dollars (unbeknownst to them) are buying only 24 months of benefits . . . ." *Id.* (emphasis in original). Because all employees had equal access to the plan, the court concluded that this claim was "more grist for the ERISA mill or the national health care debate than for the ADA." *Id.*; *see also Weyer*, 198 F.3d at 1116 ("Fox did not treat Weyer any differently because of her disability. It simply gave her the same opportunity that it gave all the rest of its employees . . . .").

2. Petitioners argue briefly (Pet. 32-33) that the decision below is contrary to this Court's decision in *Olmstead v. Zimring*, 527 U.S. 581 (1999). This contention cannot bear scrutiny. *Olmstead* did not

involve Title I of the ADA and did not present any question relating in any way to retirement benefits. To the contrary, *Olmstead* involved Title II of the ADA (which governs public services furnished by governmental entities) and presented "the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions." *Id.* at 587. Regulations required services to be provided "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." *Id.* at 592 (quoting 28 C.F.R. 35.130(d) (1998)).[8] The Court held that "[u]njustified isolation . . . is properly regarded as discrimination based on disability," *id.* at 597, but also held that a state's resource constraints could limit its obligations, *see id.* at 607. None of these issues has any bearing on, or counterpart in, the present case, and there is nothing in *Olmstead* that remotely strengthens the case for granting certiorari here.

In short, the Sixth Circuit's holding that respondent's plans do not violate § 12112(a) simply does not merit the Court's review. Because petitioners' claims would fail even if the Court were to find them to be "qualified individual[s]," this is not an appropriate case for the Court to consider the first question presented by the petition.[9]

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[8] Unlike in the present case, it was undisputed that the plaintiffs were "qualified individuals with disabilities." *See id.* at 602-03.

[9] Although not raised below, another potential independent ground to affirm the decision below may exist. In § 12201(c)(3),

II. THE DECISION BELOW IS CORRECT AND CONSISTENT WITH THIS COURT'S DECISION IN *ROBINSON*.

Petitioners suggest that certiorari is warranted because the decision below is inconsistent with this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). Petitioners also suggest

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the ADA provides a safe harbor for "a bona fide benefit plan that is not subject to State laws that regulate insurance." This provision exempts a "bona fide benefit plan" that is subject to ERISA (and correspondingly not subject to state laws governing insurance) from Title I's prohibitions and restrictions. *See Fitts v. Federal Nat'l Mortg. Ass'n*, 236 F.3d 1, 4 (D.C. Cir. 2001). The safe harbor does not apply if a plan is used as a "subterfuge to evade the purposes" of Title I, 42 U.S.C. 12201(c), but there is no allegation here of any such "specific intent." *See Ford*, 145 F.3d at 615 (Alito, J., concurring in judgment) (no need to reach other issues "[i]n light of the ease with which Ford's claims can be resolved under section [12201(c)]"). As this Court recognized in the context of the ADEA just last Term, the interaction between the anti-discrimination statutes and pension plans is much more complex than the application of those statutes to individual employment decisions. *See Kentucky Retirement Sys.*, 128 S. Ct. at 2367. Before this Court wades into that issue, it would want not only a split, which is currently lacking because no court of appeals has awarded relief to a retiree under the ADA in a non-vacated opinion, but also a decision that addressed the safe harbor provision as well as the questions raised in the petition. The interaction with ERISA is particularly important to address in light of this Court's decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), which observed that ERISA "expressly preserved the option of pension fund integration with benefits available under . . . the Social Security Act," *id.* at 514 (citing 29 U.S.C. 1054(b)(1)(B)(iv), 1054(b)(1)(C), and 1054(b)(1)(G)), and held that integration with workers' compensation benefits is authorized as well, *see id.* at 526.

that the Sixth Circuit's decision is incorrect because the ADA's prohibition on discrimination with respect to "fringe benefits" cannot be given effect unless former employees like petitioners are entitled to sue and because the decision below leaves a "remedial gap," Pet. 28. None of these arguments is persuasive. The decision below is entirely consistent with *Robinson* and correctly interprets the plain language of §§ 12111(8) and 12112(a).

A. The Sixth Circuit's Decision is Fully Consistent with *Robinson*.

1. The question in *Robinson* was whether the word "employees" in the anti-retaliation provision of Title VII included former employees. Section 704(a) makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment" who have utilized the protections of Title VII or assisted others in so doing. 42 U.S.C. 2000e-3(a). The *Robinson* Court acknowledged that "[a]t first blush," the term "employee" in § 704(a) "would seem to refer to those having an existing employment relationship with the employer in question." 519 U.S. at 341. But the Court explained that certain features of § 704(a) made it ambiguous and militated in favor of holding it to include former employees.

First, the Court emphasized that "there is no temporal qualifier" in § 704(a) itself or in surrounding provisions to make clear whether § 704(a) applies only to persons who are still "employees" at the time of the retaliation. *Id.* at 341-42. On this critical "temporal qualifier" point, the Court distinguished its decision just one month

earlier in *Walters v. Metro. Educational Enters.*, 519 U.S. 202 (1997). The Court had held unanimously in *Walters* that "employees" as used in § 701(b), 42 U.S.C. 2000e(b), relating to the 15-employee threshold for coverage by Title VII, unambiguously referred to current employees only. As the Court explained in *Robinson*, § 701(b) was clear in that regard because it "has two significant temporal qualifiers." 519 U.S. at 341 n.2. Section 701(b) provides that Title VII applies to an employer "who has fifteen or more employees for each working day . . . ." The "temporal qualifiers" in § 701(b) are the present-tense word "has," used in relation to "each working day," which together "specify the time frame in which the employment relationship must exist." *Robinson*, 519 U.S. at 341 n.2. Second, the *Robinson* Court relied on the fact that the word "employee" clearly included former employees as used in at least some provisions of Title VII. *See id.* at 342-43 (provision authorizing "reinstatement" necessarily applies to former employees).

For those reasons, the Court concluded that § 704(a) was ambiguous with respect to the question of "in what time frame must the employment relationship exist." *Id.* at 344. Having found § 704(a) ambiguous, the Court considered what interpretation would be most consistent with that section's purpose. In doing so, the Court emphasized that § 704(a) was an anti-retaliation provision that by its nature would be "effectively vitiate[d]" if it were confined to current employees. *Id.* at 345. If employers could retaliate with impunity against Title VII complainants after separation -- *e.g.*, by giving negative references -- that "would undermine

the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining . . . ." *Id.* at 346.

2. *Robinson* did not mention §§ 12111(8) or 12112(a) of the ADA, and its analysis was closely tied to the text and context of the particular Title VII provisions at issue. *Robinson's* failure to mention the ADA is hardly surprising, because the basic dynamic that drove the analysis in *Robinson* -- the potential underinclusiveness of Title VII's anti-retaliation provision -- does not arise in the ADA, which contains an anti-retaliation provision clearly drawn in broader terms than the ADA's anti-discrimination provisions at issue here. *See infra* at 26-27. The court below, like the Seventh and Ninth Circuits, engaged in a careful review of §§ 12111(8) and 12112(a) in the light of *Robinson* and correctly concluded that these ADA provisions unambiguously do not cover totally disabled retirees who neither hold nor desire a job. *See* Pet. App. 13a-21a.

a. First, these courts have observed that "Title I, unlike the section of Title VII at issue in *Robinson*, has a 'temporal qualifier.'" *Weyer*, 198 F.3d at 1112. Section 12111(8) defines "qualified individual" as "someone who '*can perform*.' That definition uses the present tense. Thus, one must be able to perform the essential functions of employment at the time that one is discriminated against." *Id.* (emphasis in original). Section 12111(8)'s other temporal qualifiers reinforce this conclusion. In addition to requiring a present ability to perform the essential functions of a job, that provision refers in the present tense to "the employment position that such individual holds or

desires." *Id.* The ADA, therefore, has more in common with the provision that the Court limited to current employees in *Walters* than to the anti-retaliation provision distinguished in *Robinson*.

Moreover, § 12112(a) explicitly incorporates the defined term "qualified individual" in its prohibition of "discriminat[ion] against a qualified individual." There is no counterpart to the "qualified individual" definition in Title VII, so loose references to Title VII and the ADA as "sibling statutes," *Ford*, 145 F.3d at 606, obscure these important differences in text and structure. The detailed and clear definition of "qualified individual," and its incorporation into the substantive prohibition, stand in stark contrast to the unilluminating definition of "employee" ("an individual employed by an employer") and the bare use of the word "employees" in § 704(a) at issue in *Robinson*. *See* 519 U.S. at 342. Although Title VII and the ADA may be closely related in other respects, on the issue here "the statutes are not analogous." *Weyer*, 198 F.3d at 1111.

Second, the contextual and policy concerns that impelled the *Robinson* Court to a broad construction of Title VII's anti-retaliation provision are not present here, because §§ 12111(8) and 12112(a) have nothing to do with retaliation and the ADA's anti-retaliation provision is expressly drawn to cover "any individual," not just the narrower subset of "qualified individual[s]" covered by Title I's anti-discrimination provisions. *See Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 458 (7th Cir. 2001) (Posner, J.) ("The difference is stark."). If the ADA's anti-retaliation provision were similar to Title VII's,

perhaps *Robinson's* logic would transfer to that provision (though that still would be beside the point given that the provisions at issue here do not relate to retaliation). In reality, however, the ADA's anti-retaliation provision is quite different, and that difference further confirms that §§ 12111(8) and 12112(a) have the limited scope imparted by their plain and precise language.

The ADA's anti-retaliation provision is in Title V, not Title I, and it is drafted to extend protection to a far broader universe of individuals than those protected by Title I. The ADA's anti-retaliation provision makes it unlawful to

> discriminate against *any individual* because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

42 U.S.C. 12203(a) (emphasis added). As Judge Posner explained, Title I's "statutory protections against discrimination are protections of '[otherwise] qualified individual[s] with a disability,' 42 U.S.C. 12112(a), but the retaliation provision protects individuals, period." *Morgan*, 268 F.3d at 458. The difference between the precisely defined term "qualified individual" and the broad inclusion of "any individual" further supports the common-sense conclusion that Congress meant what it said in §§ 12111(8) and 12112(a).

b. In *Castellano* and *Ford*, the Second and Third Circuits concluded that *Robinson's* finding of ambiguity in the word "employees" in § 704(a) served to create ambiguity in a *different* term ("qualified individual"), in a *different* type of provision (*i.e.*, one having nothing to do with retaliation), in a *different* statute. Those courts seriously misread both *Robinson* and §§ 12111(8) and 12112(a).

Both courts tracked *Robinson's* path toward a finding of ambiguity by declaring that these ADA provisions, like § 704(a), lack a temporal qualifier. The Third Circuit, for example, stated that "the ADA contains an ambiguity concerning the definition of 'qualified individual with a disability' because there is no temporal qualifier for that definition." *Ford*, 145 F.3d at 606; *see also Castellano*, 142 F.3d at 67. This statement is mystifying -- there is a temporal qualifier (indeed, multiple, mutually-reinforcing temporal qualifiers) *in* that definition *itself*. Just as in *Walters*, the repeated use of the present tense "specifies] the time-frame" in which the plaintiff must satisfy the definition, *i.e.*, at the time of the alleged discrimination. *See Robinson*, 519 U.S. at 342 n.2. As the court below correctly pointed out, "[t]he *Ford* court appears to have disregarded the plain language of the statute -- which does, in fact, contain temporal qualifiers . . . -- and instead manufactured ambiguity where none existed." Pet. App. 20a.

B. The Sixth Circuit's Decision Is Correct.

The courts that have departed from the plain language of §§ 12111(8) and 12112(a) have done so because they have had difficulty reconciling the

definition of "qualified individual" with the ADA's reference to discrimination with respect to "fringe benefits." 42 U.S.C. 12112(b)(2). The court below correctly rejected the contention that such an inconsistency exists or justifies disregarding the plain language of §§ 12111(8) and 12112(a).

1. There is no inconsistency between the "fringe benefits" language in § 12112(b)(2) and the "qualified individual" definition. Subsection (a) of § 12112 makes it unlawful to "discriminate against a qualified individual on the basis of disability," and subsection (b), entitled "Construction," provides that that quoted language "includes" activities set out in seven paragraphs. *See* App. 2a-4a. It is § 12111(8) that defines "qualified individual"; § 12112(a) incorporates that defined term by explicit reference; and nothing in § 12112(b), a gloss on § 12112(a), purports to vary that definition. Given this statutory structure, it would be passing strange for an isolated, and indeed parenthetical, reference to "fringe benefits" in § 12112(b) to defeat the plain language of § 12111(8).

Paragraph (2) of § 12112(b) is the provision that refers to "fringe benefits." It does not even address fringe benefits directly, but rather includes a reference to "providing fringe benefits" in a parenthetical listing of exemplary "relationships" that preclude an employer from "contracting out" discrimination prohibited by Title I. Paragraph (2) provides that § 12112(a) includes

> participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered

> entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs).

42 U.S.C. 12112(b)(2).

The Second and Third Circuits focused on types of "fringe benefits" that are received after employment has ended, such as pension benefits, and concluded that it would conflict with the prohibition on discrimination with respect to fringe benefits to interpret the "qualified individual" definition according to its plain language to exclude retirees. *See Ford*, 145 F.3d at 605 (stating that there is a "disjunction between the ADA's definition of 'qualified individual with a disability' and the rights that the ADA confers"); *see also Castellano*, 142 F.3d at 66-67.

The Second and Third Circuits set up a false choice between the central "qualified individual" language on the one hand and the very peripheral (for present purposes) protections against discrimination by organizations "providing fringe benefits" on the other. First, focusing on the inclusion of "fringe benefits" in paragraph (b)(2) risks losing sight of the import of the provision as a whole. As quoted in full above, it is clear that the chief purpose of this paragraph governing

"participat[ion] in a contractual or other arrangement or relationship" is to ensure that an employer cannot evade the ADA by outsourcing its hiring, training, and benefits programs. That purpose is far afield from the supposed conflict identified by those courts. If the import of paragraph (2) were a listing of potential types of prohibited discrimination, all of which applied exclusively to retirees, it might have relevance. Instead, paragraph (2) is clearly an anti-circumvention provision, not a provision designed to shed light on the meaning of "qualified individual." Moreover, the very fact that the reference to fringe benefits occurs in a parenthetical elaborating on examples of relationships covered by the anti-circumvention rationale of paragraph (2) strongly cautions against the conclusion that paragraph (2) holds the key to the question whether "qualified individual" includes retirees. The answer to that question must be found instead in the precise place the statute promises to provide the answer, namely, in the definition of "qualified individual" and its multiple temporal qualifiers.

In all events, the central error that the *Castellano* and *Ford* courts made is in incorrectly assuming that fringe benefits apply exclusively to retirees and thus that § 12112(b)(2)'s reference to fringe benefits would be meaningless if former employees are not eligible to sue under § 12112(a). *See Castellano*, 142 F.3d at 69. That argument critically depends on the proposition that only former employees receive fringe benefits, but that proposition is manifestly incorrect. In a broad range of contexts, this Court has recognized that "fringe

benefits" include many benefits that are received or utilized during employment. "Fringe benefits" thus can include health insurance, vacation pay, overtime pay, sick leave, and meals.[10] While retirement benefits might be among the items that make up the universe of fringe benefits, they are hardly the exclusive or even the most important fringe benefit.[11] Because employees who satisfy the plain language of the "qualified individual" definition receive multiple types of fringe benefits, the inclusion of "fringe benefits" in § 12112(b)(2) can be given effect without rewriting § 12111(8).

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[10] *See, e.g., Howard Delivery Serv. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 654 (2006) ("pension plans, and group health, life, and disability insurance"); *Gilbert v. Homar*, 520 U.S. 924, 932 (1997) ("health and life insurance"); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 133 (1992) (Stevens, J., dissenting) ("vacation pay and health insurance"); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 689 (1983) ("health and disability insurance programs"); *Morrison-Knudsen Constr. Co. v. Dir.*, 461 U.S. 624, 646 n.7 (1983) (Marshall, J., dissenting) ("overtime, vacation pay, meals furnished employees, and such exotic items as automobile parts"); *Fed. Mar. Comm'n v. Pac. Mar. Ass'n*, 435 U.S. 40, 47 n.7 (1978) ("bargained-for plans for vacation pay, pay guarantees, pensions, welfare, and holidays"); *Amell v. United States*, 384 U.S. 158, 160 (1966) ("sick leave and vacation pay, and for death, health, medical and pension programs").

[11] And even with respect to retirement benefits, an organization that provides fringe benefits could discriminate against *current* employees. For example, an organization that allows current employees to check the balance in their retirement plan over the telephone, but that fails to accommodate employees with hearing disabilities, would seem to come within the ambit of § 12112(b)(2).

2. To be sure, adhering to the "qualified individual" definition means that fewer claims can be brought with respect to fringe benefits received after employment has ended. But that just means that Congress could have gone further than it did in Title I. "Congress could reasonably decide to enable disabled people who can work with reasonable accommodation to get and keep jobs, without also deciding to equalize post-employment fringe benefits for people who cannot work." *Weyer*, 198 F.3d at 1112; Pet. App. 18a. The Third Circuit clearly erred when it concluded (albeit in what amounts to dictum) that the "qualified individual" definition should give way "[i]n order for the rights guaranteed by Title I to be fully effectuated." *Ford*, 145 F.3d at 606. At best, that reasoning is circular. The definition of "qualified individual" itself limits the rights guaranteed by Title I. Full effectuation of the rights guaranteed does not justify expanding the universe of the rights guaranteed. At worst, that reasoning ignores the compromises that produced the ADA, like most legislation. As the court below noted (agreeing with the Ninth Circuit's analysis of this issue), insisting on "fully effectuating" one provision of a complex statute "has the potential to subvert the intent of Congress." Pet. App. 19a. That is because major legislation like the ADA

> often results from a delicate compromise among competing interests and concerns. If we were to 'fully effectuate' what we take to be the underlying policy of the legislation, without careful attention to the qualifying words in the statute, then we

> would be overturning the nuanced compromise in the legislation, and substituting our own cruder, less responsive mandate for the law that was actually passed.

Pet. App. 19a (quoting *Weyer*, 198 F.3d at 1113); *see also Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law") (emphasis in original).

3. For similar reasons, petitioners' contention (Pet. 28) that the decision below leaves a "gap" in protection cannot alter the plain language of §§ 12111(8) and 12112(a). But, in all events, what petitioners term a "gap" is just the result of Congress' decision in the ADA to address the rights of workers and leave the difficult issues raised by the totally disabled and their pension rights primarily to other statutes. Title I was clearly -- and reasonably -- intended to "draw workers with a disability into the workforce." *Morgan*, 268 F.3d at 458. Congress simply did not undertake in the ADA to regulate benefits for people who are totally disabled and unable to work. That is principally the role of the Social Security Act's provision for SSDI benefits, which pre-existed the ADA. Just because the ADA does not cover a matter does not mean that an "arbitrary gap" (Pet. 28) exists, for the matter may be covered by other laws, such as the Social Security Act and ERISA.

Indeed, although petitioners abandoned their ERISA claim, that should not obscure the fact that

ERISA, and not the ADA, is the federal statute that most directly and comprehensively "addresses fringe benefits for people unable to perform the functions of a job even with reasonable accommodations." *Weyer*, 198 F.3d at 1112; *see also* Pet. App. 21a. Congress expressly authorized the kind of "benefit integration" with SSDI benefits at issue in this case when it enacted ERISA. *See Alessi*, 451 U.S. at 514 (citing 29 U.S.C. 1054(b)(1)(B)(iv), 1054(b)(1)(C), and 1054(b)(1)(G)). And in *Alessi*, this Court spoke approvingly of benefit integration, *see id.*, and held that ERISA permitted integration with workers' compensation benefits as well, *id.* at 526. It is thus not surprising that, far from prohibiting benefit integration when it enacted the ADA, Congress took pains to create a safe harbor delimiting the respective domains of Title I and ERISA. *See supra* at 20-21 n.9. Certainly, this kind of statutory safe harbor is not the kind of "arbitrary gap" that would strengthen the case for the Court's review.[12]

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[12] It also is far from clear that interpreting §§ 12111(8) and 12112(a) as petitioners advocate would help people who are totally disabled. Judge Posner, in *Morgan*, explained that "[a]llowing former employees to complain about postemployment discrimination that does not involve retaliation would actually hurt them [by creating] perverse incentives" for employers to stop offering disability benefits. 268 F.3d at 458. That would hurt all employees, but especially disabled employees. *See id.* Nor is it clear that petitioners' view would advance the interests of individuals with disabilities as a group. Benefit integration seeks to benefit all retirees by taking into account offsetting SSDI benefits, just as respondent's plans take into account Social Security Old Age benefits by terminating the supplemental early retirement benefits at age 62 and one month. This approach allows for

CONCLUSION

The petition should be denied.

Respectfully submitted,

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May 29, 2009

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greater benefits for all retirees -- including those with non-total disabilities who do not qualify for SSDI benefits.

APPENDIX

STATUTES INVOLVED

42 U.S.C. 12111(8) provides:

The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

Prior to January 1, 2009, 42 U.S.C. 12112(a) provided:

General rule. – No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment.

As of January 1, 2009, 42 U.S.C. 12112(a) provides:

General rule. – No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment.

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42 U.S.C. 12112(b) provides:[1]

(b) Construction -- As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the

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[1] Prior to January 1, 2009, this subsection began, "As used in subsection (a), the term 'discriminate' includes ."

covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration –

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to

screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

Prior to January 1, 2009, 42 U.S.C. 12201 provided:[2]

Construction.

(a) In general. -- Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 *(29 U.S.C.*

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[2] New subsections that are immaterial to this case were added to § 12201, effective January 1, 2009. The subsections reproduced herein remain unchanged

790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to other laws. -- Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act. Nothing in this Act shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I, in transportation covered by subchapter II or III, or in places of public accommodation covered by subchapter III.

(c) Insurance. -- Subchapters I through IV of this Act shall not be construed to prohibit or restrict --

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III.

(d) Accommodations and services. -- Nothing in this Act shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

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42 U.S.C. 12203 provides:

Prohibition against Retaliation and Coercion.

(a) Retaliation. -- No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(b) Interference, coercion, or intimidation. -- It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in

the exercise or enjoyment of, any right granted or protected by this Act.

(c) Remedies and procedures. -- The remedies and procedures available under sections 107, 203, and 308 of this Act shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to subchapter I, subchapter II and subchapter III, respectively.